




# SORNA COMPLIANCE IN MONTANA

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# What is SORNA?

- SORNA is the federal Sex Offender Registration and Notification Act, which is Title I of the Adam Walsh Child Protection and Safety Act of 2006.
- SORNA provides a comprehensive set of minimum standards for sex offender registration and notification in the United States.
- The Adam Walsh Act was enacted in 2006, “[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims.”

# Adam Walsh Reauthorization Act of 2017

- H.R. 118 was passed in 2017 to “reauthorize certain programs established by the Adam Walsh Child Protection and Safety Act of 2006, and for other purposes.”
- The Act:
  - reauthorized through FY2022 SORNA’s Sex Offender Management Assistance (SOMA) program; and
  - reauthorized through FY2022 the activities of the U.S. Marshals Service to locate and apprehend sex offenders who violate sex offender registration requirements; and
  - **allows a state, Indian tribe, or territory to establish an alternative method for a registered sex offender to comply with the in-person verification requirement.** DOJ must approve an alternative verification method before it is implemented.

- The Act also revised several of SORNA's requirements specific to juvenile offenders:
  - It reduced from 25 years to 15 years the required registration period for certain juvenile delinquent sex offenders who maintain a clean record;
  - It allows a state, Indian tribe, or territory to exempt from disclosure on a public website information about juvenile delinquent sex offenders;
  - It limits the aggravated sex abuse offenses that trigger sex offender registration requirements for a juvenile at least 14 years old who is adjudicated delinquent for a comparable or more severe sex offense; and
  - The National Institute of Justice must report to Congress on the public safety impact, recidivism, and collateral consequences of long-term registration of juvenile sex offenders.

# Montana has not substantially implemented SORNA

- This presentation will address the areas where Montana has not met SORNA requirements, and what it would need to do to become compliant.
- Important to note, this presentation will not discuss **full implementation** of SORNA. There are several areas where Montana deviates from SORNA, but the SMART office has determined these deviations do not substantially disserve the purposes of SORNA. For Montana to achieve full compliance with SORNA, it would need to address those deviations.

# So, what does SORNA require?

- Jurisdictions must include certain **sex offenders** in their registration schemes.
- As defined by SORNA, **sex offenders** are individuals convicted of **sex offenses**.
- An adult sex offender is **convicted** for purposes of SORNA if he or she has been subject to penal consequences based on the conviction, however it may be styled.
- Convictions of juveniles prosecuted as adults or persons over 14 adjudicated delinquent for a serious sex offense must also be included in the jurisdiction's registry.
- SORNA specifies the sex offenses which, if they already exist in a jurisdiction, must be included in any jurisdiction's registration scheme, as well as those convictions from other jurisdictions (including the federal government and foreign countries) which must be included. Jurisdictions are not required to enact any new substantive sex offense crimes in order to substantially implement SORNA.

# Offenses That Must Be Included in the Registry

- Montana captures most of its state offenses required to be registered by SORNA, however, in order to **fully implement** SORNA's requirements, Montana must also register individuals convicted of:
  - § 45-5-502(1) Sexual Assault
  - § 45-5-622(2)(b)(ii) Endangering Welfare of Children
  - § 45-5-627(1)(a) Ritual Abuse of Minor

# SORNA Tiering of Offenses

- Once a jurisdiction determines which sex offenses will require registration, it will have to decide what 'level' of registration those convicted of each particular offense must register.
- SORNA establishes a baseline or minimum standard by way of a 3-tier classification system.

# SORNA Tier III Offenses

- SORNA requires jurisdictions to tier the following offenses as a '**Level 3**':
  - Any convictions that involve:
    - Non-parental kidnapping of a **minor**
      - **Minor** = individual under 18
    - Any **Sexual Act** with another
      - **Sexual Act** = defined on next slide\*
    - **Sexual Contact** with a minor under 13
      - **Sexual Contact** = offenses that cover sexual touching of or contact with the intimate parts of the body, either directly or through the clothing
  - A person previously convicted of a Tier II offense whose current sex offense is punishable by more than one year imprisonment

# Definitions

- **Sexual Act** means offenses involving:
  - Any direct touching of the genitals of a person under 16; or
  - Oral, anal, or vaginal penetration of any kind which occurs:
    - when the victim is under 13
    - by force
    - by way of threat or intimidation
    - when the victim has been rendered unconscious
    - when the victim is incapable of appraising the nature of their conduct
    - when the victim is physically incapable of communicating non-consent
    - when a drug or intoxicant has been administered which substantially impairs the ability of the other person to appraise or control their conduct

# SORNA Tier II Offenses

- SORNA requires jurisdictions to tier the following offenses as a ‘**Level 2**’:
  - Any conviction involving:
    - The use of **minors** in prostitution (to include solicitations)
    - Enticing a minor to engage in criminal sexual activity
    - A non-forcible **Sexual Act** with a minor 16 or 17 years old
    - **Sexual Contact** with a minor 13 or older
    - The use of a **minor** in a sexual performance
    - The production or distribution of child pornography
    - A person previously convicted of a Tier I offense whose current sex offense is punishable by more than one year imprisonment

# SORNA Tier I Offenses

- SORNA requires jurisdictions to tier the following offenses as a **'Level 1'**:
  - Convictions that have an element involving a **Sexual Act** or **Sexual Contact** with another, that are not included in the Tier II or Tier III, including:
    - False imprisonment of a **minor**;
    - Video voyeurism of a **minor**; and
    - Possession or receipt of child pornography.

# SORNA Frequency and Duration of Registration

- SORNA requires that all offenders register for a duration of time and frequency based on the tier of the offense of conviction:
  - SORNA tier I offenders must register in-person at the registering agency **once a year for 15 years**,
  - SORNA tier II offenders must register in-person at the registering agency **every 6 months for 25 years**,
  - SORNA tier III offenders must register in-person at the registering agency **every 3 months for life**.

# Montana's Frequency of Registration

## Mont. Code Ann. § 46-23-504(6)

- Montana DOJ periodically mails offenders an address verification form, depending on the level of the offender. Within 10 days of the receipt of the form, the offender must sign, notarize, and **return the form to the appropriate registration agency in person.**
- Level 0 and Level 1 offenders are sent a verification form **annually;**
- Level 2 offenders are sent a verification form **every six months;** and
- Level 3 offenders are sent a verification form **every three months.**
- Offenders reporting as transient must report **monthly**, in person, to the registry agency with which the transient is registered.

## Montana's Duration of Registration, Mont. Code Ann. § 46-23-506

- All sexual offenders in Montana are required to register for life.

# SORNA Reduced Registration Period

- There are only two classes of sex offenders that SORNA permits a reduced registration period: tier I offenders, and any tier III offender who is required to register because of a juvenile adjudication.
- Under SORNA, a tier I or a juvenile tier III offender's registration and notification requirement may be terminated only if the sex offender has had 10 years with a "clean record", which means:
  - not being convicted of any offense for which imprisonment for more than 1 year may be imposed;
  - not being convicted of any sex offense;
  - successful (without revocation) completion of any period of supervised release, probation, and parole; and
  - successful completion of an appropriate sex offender treatment program certified by a jurisdiction or the Attorney General (34 USC 20917(b)(1)).

# Montana Reduced Registration Period, Mont. Code Ann. § 46-23-506

- Level 1 offenders may petition after 10 years
- Level 2 offenders may petition after 25 years
- A petition for relief from the duty to register is heard before the District Court and may be granted upon a finding that:
  - The offender has remained a law-abiding citizen; and
  - Continued registration is not necessary for public protection and that relief from registration is in the best interests of society.
- Montana does not require that a sex offender successfully complete, **without revocation**, any period of supervised release, probation, or parole in order to qualify for a registration period reduction.

# Petitions for Relief

- Mont. Code Ann. § 46-23-506 dictates that the petition may be filed with the sentencing court **or** the district court for the judicial district in which the offender resides
  - Some jurisdictions are referring offenders to the sentencing court only
- Mont. Code Ann. § 46-23-506 also vests in the district court significant discretion in deciding whether to grant the petition
  - This can lead to inconsistent or disparate results across local jurisdictions in Montana
- If Montana were to adopt a SORNA-based approach, an offender's relief from the duty to register is automatic after the specified duration if he or she has not committed another qualifying sex offense during the period of registration
  - This could significantly decrease the burden on the courts, county attorneys, and public defenders from having to hold hearings on these petitions

# Montana's Use of a Risk Assessment

- Like SORNA, Montana determines the frequency of registration, as well as the availability of the reduced registration period, based on the level of the offender.
- Unlike SORNA, Montana classifies its offenders into levels 1, 2, and 3, **on the basis of a psychosexual evaluation risk assessment process.**
- Low risk offenders are classified as level 1, moderate risk offenders as level 2, and high-risk offenders as level 3.

# Mont. Code Ann. § 46-23-509

- The department shall adopt rules for the qualification of sexual offender evaluators who conduct psychosexual evaluations of sexual offenders and sexually violent predators and for determinations by sexual offender evaluators of the risk of a repeat offense and the threat that an offender poses to the public safety.
- Prior to sentencing of a person convicted of a sexual offense, the department or a sexual offender evaluator shall provide the court with a psychosexual evaluation report recommending one of the following levels of designation for the offender:
  - level 1, the risk of a repeat sexual offense is low;
  - level 2, the risk of a repeat sexual offense is moderate;
  - level 3, the risk of a repeat sexual offense is high, there is a threat to public safety, and the sexual offender evaluator believes that the offender is a sexually violent predator.
- Upon sentencing the offender, the court shall:
  - review the psychosexual evaluation report, any statement by a victim, and any statement by the offender;
  - designate the offender as level 1, 2, or 3; and
  - designate a level 3 offender as a sexually violent predator.

# Non-Designated Problem

- Offenders convicted in courts outside of Montana (military, tribal, and federal convictions) are classified as level 0 offenders (“non- designated”), unless the offender moves to Montana from a state where Montana recognizes the foreign tier level, or until such time as the Montana Attorney General or appropriate County Attorney petitions a District Court to assign a risk level designation.
- Currently, just over half of all Montana sex offenders are non-designated, meaning they report at the frequency of a Level 1 offender.

- Because Montana bases sex offenders' frequency of registration and the availability of reduced registration periods on a risk assessment process, Montana does not meet SORNA requirements.

# Montana Offense-Based Tiering

## ■ SORNA Tier I Offenses:

- § 45-5-502(1), **Sexual Assault\***
- § 45-5-301, **Unlawful Restraint** (non-parental, v < 18)
- § 45-5-601(3), **Prostitution** (v < 18)
- § 45-5-625(1)(e), **Sexual Abuse of Children** (possession of child pornography)

\*Not currently a registerable offense in Montana

# Montana Offense-Based Tiering

## ■ SORNA Tier II Offenses:

- § 45-5-502(3), **Sexual Assault** (victim < 16 years old and the offender is 3 or more years older than the victim **or** if the offender inflicts bodily injury upon anyone in the course of committing sexual assault)
- § 45-5-504(3), **Indecent Exposure** (v < 16 and offender is four or more years older than the victim)
- § 45-5-507, **Incest** (sexual intercourse), victim 16 or 17\*
- § 45-5-507, **Incest** (sexual contact), victim 13-17\*
- § 45-5-602, **Promoting Prostitution**, v < 18
- § 45-5-603, **Aggravated Promotion of Prostitution**, victim under 18
- § 45-5-625, **Sexual Abuse of Children** (except subsection (1)(e), see tier I, above)
- § 45-5-704, **Sexual Servitude**, v < 18
- § 45-5-705, **Patronizing Victim of Sexual Servitude**, v < 18

# Montana Offense-Based Tiering

## ■ SORNA Tier III Offenses:

- § 45-5-302, **Kidnapping** (non-parental, v < 18)
- § 45-5-303, **Aggravated Kidnapping** (non-parental, v < 18)
- § 45-5-503, **Sexual Intercourse Without Consent**
- § 45-5-508 **Aggravated Sexual Intercourse Without Consent,**
- § 45-5-507, **Incest** (sexual intercourse), v < 16
- § 45-5-507, **Incest** (sexual contact), v < 13
- § 45-5-627(1)(a), **Ritual Abuse of Minor**

# Consensual Sexual Contact

- SORNA does NOT require registration in the following situations:
  - If both participants are adults, and neither is under the custodial authority of the other (e.g., inmate/prison guard) and the conduct was consensual, then this conduct does not constitute a registerable sex offense for purposes of the Adam Walsh Act. 2)
  - With respect to acts involving at least one minor (person under 18) who engages in consensual sexual conduct, the following minimum standards apply:
    - Where both participants are at least 13 years old and neither participant is more than 4 years older than the other, a sex offense conviction based on consensual sexual conduct does not require registration under the Adam Walsh Act.

# Residency Restrictions

- Residency restrictions and safety zones are **not** part of the Adam Walsh Act. All such restrictions are the result of jurisdictional or local legislation, not federal law or the Adam Walsh Act.
- Montana Code Annotated § 45-5-513 places geographic restrictions on **high-risk sexual offenders**
- A “high-risk sexual offender” means a person 18 years of age or older who is designated as a sexually violent predator under 46-23-509 and has committed a sexual offense against a victim 12 years of age or younger
- For high-risk sexual offenders who are no longer under the supervision of the department of corrections, the residential and geographic restrictions provided in subsections (1)(a) and (1)(e) do not apply if the high-risk sexual offender possesses an **approved safety plan** from a sexual offender evaluator to mitigate the risk of reoffending and protect public safety.

# Risk Assessment Tools and SORNA

- Many jurisdictions use a risk assessment process for a variety of purposes, including:
  - Aiding in making release decisions or sentencing recommendations;
  - Structuring treatment programming;
  - Determining the level and method of community notification for registered sex offenders; and
  - Establishing supervision intensity.
- In all instances, jurisdictions may use risk assessment tools as a justification for increasing SORNA's minimum notification requirements.
- The SMART Office encourages jurisdictions that use an assessment process to do so without substantially undermining the purposes of SORNA's conviction-based tiering or other requirements.

# Wyoming's SORNA-Compliant Public Website Disclaimer

- “This information is being made available on the Internet to facilitate public access to information about persons who have committed sex offenses to enable you to take appropriate precautions to protect yourself and those in your care from possible harm. **DCI has not assessed any specific risk of re-offense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous.** The reason for providing this information is to make it more easily available and accessible, not to warn about any specific individual. Individuals included within the registry are included solely by virtue of their conviction record and state law. Public access to registry information is intended solely to educate the public.”

# Retroactivity

- The application of the SORNA standards to sex offenders whose convictions predate SORNA creates no ex post facto problem “because the SORNA sex offender registration and notification requirements are intended to be non-punitive, regulatory measures adopted for public safety purposes, and hence may validly be applied (and enforced by criminal sanctions) against sex offenders whose predicate convictions occurred prior to the creation of these requirements. See *Smith v. Doe*, 538 U.S. 84 (2003).”
- Montana’s SVOR Act does not violate the ex post facto clauses of either the United States or Montana Constitutions. *State v. Mount*, 2003 MT 275, ¶ 90, 317 Mont. 481, 78 P.3d 829.

- As a practical matter, jurisdictions may not be able to identify all sex offenders who fall within the SORNA registration categories, where the predicate convictions predate the enactment of SORNA or the jurisdiction's implementation of the SORNA standards in its registration program, particularly where such sex offenders have left the justice system and merged into the general population long ago.
- **But many sex offenders with such convictions will remain in (or reenter) the system because:**
  - They are incarcerated or under supervision, either for the predicate sex offense or for some other crime;
  - They are already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law; or
  - They hereafter reenter the jurisdiction's justice system because of conviction for some other crime (whether or not a sex offense).

- Sex offenders in these three classes are within the cognizance of the jurisdiction, and the jurisdiction will often have independent reasons to review their criminal histories for penal, correctional, or registration/notification purposes.
- Accordingly, a jurisdiction will be deemed to have substantially implemented the SORNA standards with respect to sex offenders whose predicate convictions predate the enactment of SORNA or the implementation of SORNA in the jurisdiction's program if it registers these sex offenders, **when they fall within any of the three classes described above**, in conformity with the SORNA standards.

- The required retroactive application of the SORNA requirements will also be limited in some cases by the limits on the required duration of registration.
- As discussed, SORNA requires minimum registration periods of varying length for sex offenders in different categories, defined by criteria relating to the nature of their sex offenses and their history of recidivism. This means that a sex offender with a pre-SORNA conviction may have been in the community for a greater amount of time than the registration period required by SORNA. For example, SORNA § 115 requires registration for 25 years for a sex offender whose offense satisfies the “tier II” criteria of section 111(3). A sex offender who was released from imprisonment for such an offense in 1980 is already more than 25 years out from the time of release.
- In such cases, **a jurisdiction may credit the sex offender with the time elapsed from his or her release** (or the time elapsed from sentencing, in case of a non-incarcerative sentence), and does not have to require the sex offender to register on the basis of the conviction, even if the criteria for retroactive application of the SORNA standards under this Part are otherwise satisfied.

# Tribal Considerations

- Three tribes in Montana have substantially implemented SORNA: Chippewa Cree Business Committee, Crow Tribal Council and Fort Peck Tribal Executive Board. The other three tribes are in varying stages of SORNA implementation.
- One additional tribe, the Confederated Salish and Kootenai Tribes, has opted out of being a SORNA registration jurisdiction.
- There are no current MOU's or other agreements between any of the SORNA tribes and Montana regarding the submission or transmission of biometric information or any other information-sharing arrangements.
- **In order to substantially implement SORNA, Montana will need to demonstrate that it is handling registration and notification duties for those sex offenders living, working or attending school on the lands of the tribes that have either delegated their registration duties to the state or otherwise opted out of being a SORNA registration jurisdiction.** In addition, Montana would also be required to demonstrate cooperation with the tribes that are functioning as SORNA registration jurisdictions, to the extent that those tribes seek cooperation from the state.

# Juvenile Registration

- Section 34 U.S.C. §20911 provides that delinquency adjudications count as convictions "only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18, United States Code), or was an attempt or conspiracy to commit such an offense."
- Hence, SORNA does not require registration for juveniles adjudicated delinquent for all sex offenses for which an adult sex offender would be required to register, but rather requires registration only for a defined class of older juveniles who are adjudicated delinquent for committing particularly serious sexually assaultive crimes (or attempts or conspiracies to commit such crimes). Considering the relevant aspects of the federal "aggravated sexual abuse" offense referenced in section 34 U.S.C. §20911, it suffices for substantial implementation if a jurisdiction applies SORNA's requirements to juveniles at least 14 years old at the time of the offense who are adjudicated delinquent for committing (or attempting or conspiring to commit) offenses under laws that cover:
  - engaging in a sexual act with another by force or the threat of serious violence; or
  - engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim.
- "Sexual act" for this purpose should be understood to include any degree of genital or anal penetration, and any oral-genital or oral-anal contact.

# Montana Juvenile Registration

- To substantially implement SORNA, Montana would need to amend Mont. Code Ann. § 41-5-1513 to conform with the aforementioned requirement that captures older juveniles who are adjudicated delinquent for committing particularly serious sexually assaultive crimes.
- 41-5-1513(d) currently provides that in the case of a delinquent youth who has been adjudicated for a sexual offense, as defined in 46-23-502, **the youth is exempt from the duty to register as a sexual offender pursuant to Title 46, chapter 23, part 5**, unless the court finds that:
  - (i) the youth has previously been found to have committed or been adjudicated for a sexual offense, as defined in 46-23-502; or
  - (ii) registration is necessary for protection of the public and that registration is in the public's best interest;
- Under SORNA, certain juvenile delinquent sex offenders who maintain a clean record can reduce the required registration period to 15 years;
- Montana can exempt from disclosure on a public website information about juvenile delinquent sex offenders.

# National Compliance

- 17 states: Alabama, Colorado, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, and Wyoming;
- 108 tribes; and
- 3 territories: Guam, the U.S. Virgin Islands and the Commonwealth of the Northern Mariana Islands.

# Why Would Montana Want to Implement SORNA?

## ■ Consistency between jurisdictions enhances effectiveness

- The effectiveness of individual states' registration programs depends on also having effective arrangements for tracking of registrants as they move among jurisdictions and national baseline registration and notification standards
- Sex offender registration could not be effective if registered sex offenders could simply disappear from the purview of the registration authorities by moving from one jurisdiction to another, or if registration and notification requirements could be evaded by moving from a jurisdiction with an effective program to a nearby jurisdiction that required little or nothing in terms of registration and notification.

# The Risk Assessment

- Montana utilizes a risk assessment tool to notify the public of an offender's risk of committing a repeat offense and the threat that an offender poses to public safety.
- Yet, over half of all sexual offenders living, working, or attending school in the State of Montana are non-designated, and thus, **provide no information to the public at all regarding the offender's risk to reoffend or threat to public safety.**
- Additionally, many of these non-designated offenders fall into SORNA tier II or tier III registration categories, and are escaping the longer, and more frequent registration duties of these tier levels as a result of being non-designated.

# JAG Byrne Grant Funding

- The JAG program is the leading source of federal justice funding to state and local jurisdictions.
- SORNA provides a financial incentive for eligible jurisdictions to adopt its standards, by requiring a 10% reduction of federal justice assistance funding to an eligible jurisdiction if the Attorney General determines that the jurisdiction has failed to “substantially implement” SORNA. 42 U.S.C. 16925(a).
- SORNA set a general time frame of three years for implementation, running from the date of enactment of SORNA, i.e., from July 27, 2006, with two one-year extensions available (through July 2011).

- Montana DOJ has been working toward implementation of SORNA since its passage in 2006, but because Montana is not yet considered substantially compliant, the State and local jurisdictions have faced reductions in federal JAG funds.
- A JAG reduction has been applied for each year Montana has failed to have substantially implemented SORNA since at least 2011.
- Montana can apply for reallocation of these withheld funds, but, if reallocated, they may only be used for the purpose of implementing SORNA.
- In addition to losing 10% of eligible grant funding, Montana is also not eligible to receive the SORNA compliant “bonus funds,” which are calculated using SORNA penalty funds from nonimplementing states and U.S. territories during the current fiscal year.

# JAG Byrne Grant Funding State Allocation

Year	Award Amount	Year	Award Amount
2003	\$2,613,817	2012	\$985,310
2004	\$2,476,382	2013	\$956,632
2005	\$1,623,781	2014	\$963,404
2006	\$1,076,424	2015	\$856,904
2007	*no data available	2016	\$923,827
2008	\$361,873	2017	\$937,196
2009	\$922,000	2018	\$924,597
2010	\$1,563,677	2019	\$914,034
2011	\$1,249,291		

# JAG Byrne Grant Funding

## Sample Comparison of Local Allocations

FY2005 Locality	Award Amount	FY2019 Locality	Award Amount
City of Great Falls	\$131,675	City of Great Falls	\$26,189
Lake County	\$14,182	Lake County	\$13,939
City of Missoula	\$75,879	City of Missoula	\$52,238
City of Billings	\$91,924	City of Billings	\$71,575
City of Havre	\$49,274	City of Havre	\$10,372
Flathead County	\$27,536	Flathead County	\$28,208
City of Helena	\$58,591	City of Helena	\$29,146
City & County, Butte	\$50,103	City & County, Butte	\$17,084
Blackfeet Tribe	\$17,495	Blackfeet Tribe	\$22,247
Gallatin County	\$20,497	Gallatin County	\$12,672
City of Kalispell	\$15,528	City of Kalispell	\$10,279

# Next Steps

- Montana's Substantial Implementation Review can be found here <https://www.smart.gov/pdfs/sorna/montana-hny.pdf>
- The SMART Office has further information and helpful FAQs, which can be found here <https://www.smart.gov/sorna.htm>
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