



March 2019

## **SORNA Substantial Implementation Review State of South Dakota - Revised**

The U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) applauds the state of South Dakota for the extensive work and effort to substantially implement Title I of the Adam Walsh Act, the Sex Offender Registration and Notification Act (SORNA). The SMART Office has completed its review of South Dakota's SORNA substantial implementation materials and has determined that South Dakota continues to substantially implement SORNA.

In April 2010, the South Dakota Office of Attorney General submitted a substantial implementation submission package to the SMART Office. In addition, email and phone correspondence with the South Dakota Department of Criminal Investigation filled in gaps in information and procedure, which informed our review. In September 2010, the SMART Office issued a SORNA Substantial Implementation Review to South Dakota that found the state had substantially implemented SORNA.

Upon request of the SMART Office, in August 2018, the South Dakota Office of Attorney General authorized a new substantial implementation review of the state's laws and practices. Our review is based on publically available state law and practice; correspondence with South Dakota's Office of Attorney General clarified other outstanding issues.

Our review of these materials follows the outline of the SMART Office Substantial Implementation Checklist-Revised, which contains 14 sections addressing the SORNA requirements. Under each section, we indicate whether South Dakota meets the SORNA requirements of that section, or deviates from the SORNA requirements in a way that does not substantially disserve SORNA's requirements. While South Dakota is encouraged to work toward rectifying any deviations that do not disserve SORNA's requirements in order to achieve full implementation of SORNA, this is not required to maintain substantial implementation.

This report is an exhaustive review based on the totality of South Dakota's publically available state laws and practices related to sex offender registration. The report details every area in which South Dakota deviates from, but does not substantially disserve, the requirements of SORNA. We encourage South Dakota to review the information below, share it with relevant stakeholders and contact the SMART Office to develop a strategy to address these remaining issues. The SMART Office will continue to provide any necessary technical assistance to help South Dakota achieve full implementation. South Dakota will be required to keep the SMART Office informed of its progress in addressing the remaining provisions and annually certify continuing implementation of SORNA when applying for Edward Byrne Memorial Justice Assistance Grant funding.

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

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

South Dakota meets all of the SORNA requirements in this section.

## **II. Offenses That Must Be Included in the Registry**

SORNA requires certain federal, military and foreign offenses are included in a jurisdiction's registration scheme. In addition, SORNA requires that the jurisdiction capture certain sex offenses, both offenses from its jurisdiction and from other SORNA registration jurisdictions, in its registration scheme. SORNA also requires that certain adjudications of delinquency are included in a jurisdiction's registration scheme.

### **A. South Dakota Offenses**

South Dakota includes most of the state offenses for which SORNA requires registration in its registration scheme. The following South Dakota offenses are not included in the state's registration law:

- South Dakota Codified Law (CL) 22-19-17 – False imprisonment. Any person who knowingly and purposely restrains another person unlawfully so as to substantially interfere with such person's liberty is guilty of false imprisonment (where the victim is a minor).
- South Dakota CL 22-21-4 – Use or dissemination of visual recording or photographic device without consent and with intent to self-gratify, harass or embarrass (where the victim is a minor and the photograph or visual recording constitutes child pornography).
- South Dakota CL 22-22-7.6 – Sexual acts between a jail employee and a detainee (where detainee is an adult).

### **B. Offenses of Other SORNA Registration Jurisdictions**

South Dakota requires registration for any offense that is equivalent to a registerable South Dakota offense. Therefore, South Dakota may not require registration for offenses from other jurisdictions that are comparable to those offenses listed above.

### **C. Federal Offenses**

South Dakota meets the SORNA requirements of this subsection.

#### D. Military Offenses

South Dakota meets the SORNA requirements of this subsection.

#### E. Foreign Offenses

South Dakota includes foreign convictions in its registration scheme if the offense is equivalent to a registerable South Dakota offense. Therefore, there are some foreign offenses that do not appear to have an equivalent offense under South Dakota law and, if not, may not require registration under South Dakota's existing scheme.

#### F. Juveniles

South Dakota's registry scheme includes juveniles convicted in adult court of sex offenses and juveniles 14 years or older at the time of the offenses that have been adjudicated of rape as defined in South Dakota CL 22-24B-1(1).

These deviations do not substantially disserve the purposes of the SORNA requirements in this section.

### **III. Required Registration Information**

SORNA requires the jurisdiction collect certain pieces of information from and for each offender that it registers, and requires the jurisdiction keep that registration information, in a digitized form, in its registry.

South Dakota deviates from SORNA requirements in that law enforcement does not collect the following information in its registry:

- Vehicle registration numbers or identifiers and descriptions of the permanent or frequent location where all automobiles owned or operated by the offender, whether for work of personal use, are kept.<sup>1</sup>
- Information of all aircrafts or watercrafts owned or operated by the sex offenders, whether for work or personal use.

These deviations do not substantially disserve the purposes of the SORNA requirements in this section.

### **IV. Where Registration Is Required**

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

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<sup>1</sup> South Dakota does collect permanent or frequent locations where automobiles are kept if the sex offender resides in the vehicle.

South Dakota deviates from SORNA requirements in that it does not register offenders who are convicted in South Dakota if the offenders will not be incarcerated or residing, working or attending school there. Pursuant to South Dakota state law, the court of conviction informs sex offenders upon conviction of their duty to register and completes a State of South Dakota Sex Offender Duty to Register form; the form memorializes offenders' certification that they understand their sex offender registration requirements, memorializes their planned addresses and directs offenders to appear at their local law enforcement agency for registration within three days. The form is forwarded to the prosecuting attorney, the South Dakota Division of Criminal Investigations and the registration agency where the offender plans to reside.

These deviations do not substantially disserve the purposes of the SORNA requirements in this section.

#### **V. Initial Registration: Generally**

SORNA requires that when an offender is incarcerated within the jurisdiction, registration must occur before release from imprisonment for the registration offense. Similarly, when an offender is sentenced within the jurisdiction, but not incarcerated, SORNA requires registration occur within three business days of sentencing. Finally, when an offender has been convicted, sentenced or incarcerated in another jurisdiction (including federal or military court), the jurisdiction must register the offender within three business days of the offender establishing residence, employment or school attendance within the jurisdiction. SORNA also requires that, during the initial registration process, the jurisdiction inform the offender of his or her registration duties and require the offender to acknowledge in writing that he or she understands those duties.

South Dakota deviates from SORNA requirements in that it does not register offenders convicted in South Dakota if the offenders will not be incarcerated, residing, working or attending school there; however, it does share the State of South Dakota Sex Offender Duty to Register form with the agency responsible for sex offender registration in the offender's subsequent residence jurisdiction.

These deviations do not substantially disserve the purposes of the SORNA requirements in this section.

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

SORNA requires each registration jurisdiction have a procedure in place to recapture three categories of sex offenders: (1) those who are currently incarcerated or under supervision, either for the predicate sex offense or for some other crime; (2) those who are already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law; and (3) those who reenter the jurisdiction's criminal justice system because of some other felony conviction (whether or not it is a sex offense).

South Dakota meets all of the SORNA requirements in this section.

## **VII. Keeping the Registration Current**

SORNA requires that when a registered sex offender resides in a jurisdiction, the sex offender must immediately appear in person to update his or her name, residence, employment, school attendance and termination of residence. SORNA also requires that when an offender resides in a jurisdiction, the sex offender must immediately update any changes to his or her email addresses, internet identifiers, telephone communications, vehicle information and temporary lodging information.

When an offender works in a jurisdiction, but does not reside or attend school there, SORNA requires the offender immediately appear in person to update employment-related information. When an offender attends school in a jurisdiction, but does not reside or work there, SORNA requires the offender immediately appear in person to update school-related information.

SORNA also requires when an offender intends to travel outside the United States, the offender notify the residence jurisdiction at least 21 days in advance of such travel.

In addition, SORNA requires when an offender notifies the jurisdiction of intent to relocate to another country to live, work or attend school, or intent to travel to another country, the jurisdiction must do three things: (1) immediately notify any other jurisdiction where the offender is either registered or is required to register of that updated information; (2) immediately notify the United States Marshals Service; and (3) immediately update NCIC/NSOR.

South Dakota deviates from SORNA requirements in that it does not require sex offenders to notify their residence jurisdiction immediately of any updates to email addresses, instant messenger addresses, other designations used in internet communications, vehicle information or temporary lodging information. However, when an offender appears in person to update their residence, school or employment information, they must confirm that all of their registration information, including vehicle and internet and telephone designations, is accurate.

These deviations do not substantially disserve the purposes of the SORNA requirements in this section.

## **VIII. Offense Tiering and Verification/Appearance Requirements**

SORNA requires offenses be classified based on the nature of the offense of conviction and that offenders register for a duration of time, and make in-person appearances at the registering agency, based on the tier of the offense of conviction.

### **A. Offense Tiering**

The SMART Office has reviewed all of South Dakota's publically available state laws and practices related to sex offender registration (see the Appendix "South Dakota State

Statutes” for information about South Dakota’s classification of its offenders and associated registration requirements). South Dakota requires all sex offenders to register for life.

#### B. Duration of Registration

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

South Dakota requires lifetime registration for all sex offenders.

#### C. Frequency of Registration

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

South Dakota deviates from SORNA requirements in that it requires all offenders to update their registration information in person at their registration office twice per year. Additionally, the South Dakota Division of Criminal Investigation mails nonforwardable verification forms to sex offenders’ last reported addresses at least once per year. This form must be returned to the Division of Criminal Investigation within 10 days of the offender’s receipt of the form. In addition, South Dakota county sheriffs must annually confirm that addresses listed on sex offender registry profiles match each registered sex offender’s residence. After performing this residence check, county sheriffs confirm their results with the Division of Criminal Investigation.

#### D. Reduction of Registration Periods

SORNA creates certain requirements under which a jurisdiction can allow an offender to have a reduced registration period.

South Dakota deviates from SORNA requirements in that it allows the following offenders to petition for removal from the sex offender registry after five years of compliant registration with a clean record as defined within South Dakota CL 22-24B-19 (and discussed below):

- South Dakota CL 22-22-1(5), statutory rape, or an attempt to commit statutory rape, but only if the petitioner was 21 years of age or younger at the time the offense was committed or attempted.
- South Dakota CL 22-24B-1(1), rape (as set forth in 22-22-1), but only if the petitioner is a juvenile adjudicated delinquent.
- South Dakota CL 22-22(7), sexual contact, if the victim was between the ages of 13 and 16 and the petitioner was at least three years older than the victim, but only if the petitioner was 21 years of age or younger at the time the offense was committed.

- An out-of-state, federal or court martial offense that is comparable to the elements of the crimes immediately above.

#### E. Clean Record Requirements

Under SORNA, a registered sex offender has a clean record if he or she has satisfied certain requirements.

South Dakota's clean record requirements deviate from SORNA requirements in that South Dakota allows certain classes of offenders to apply for a reduction of their registration period if the circumstances surrounding the crime requiring registration did not involve a child under the age of 13, the petitioner is not a recidivist sex offender, the petitioner has substantially complied in good faith with their state registration requirements and the petitioner demonstrates to the satisfaction of the court that they do not pose a risk or danger to the community.

These deviations do not substantially disserve the purposes of the SORNA requirements in this section.

### **IX. Public Registry Website Requirements**

SORNA requires each jurisdiction maintain a public sex offender registry website and publish certain registration information on that website. SORNA also requires that certain information not be displayed on a jurisdiction's public registry website.

South Dakota's public sex offender registry website deviates from SORNA requirements in that it does not include offenders' employer addresses, school addresses or vehicle information. Although South Dakota's public sex offender registry website does not include offenders' employer address, school addresses or vehicle information, the state does provide a notice on its public registry website informing the public that such information is available at the police station of the municipality where the sex offender resides, temporarily domiciles, attends school or works and provides instructions on how to access it.

These deviations do not substantially disserve the purposes of the SORNA requirements in this section.

### **X. Community Notification**

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

South Dakota's community notification provisions deviate from SORNA requirements in that updates to sex offenders' employment or school enrollment information are not automatically shared with the general public via email from the state's public sex offender

registry website. As described in Section IX, this information is available at the police station of the municipality where the sex offender resides, temporarily domiciles, attends school or works.

These deviations do not substantially disserve the purposes of the SORNA requirements in this section.

#### **XI. Failure to Register as a Sex Offender: State Penalty**

SORNA requires that each jurisdiction, other than a federally recognized Indian tribe, provide a criminal penalty that includes a maximum term of imprisonment that is greater than one year for the failure of a sex offender to comply with their registration requirements.

South Dakota meets all of the SORNA requirements in this section.

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

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

South Dakota meets all of the SORNA requirements in this section.

#### **XIII. When a Jurisdiction Has Information That a Sex Offender May Have Absconded**

SORNA requires that when a jurisdiction has information that a sex offender may have absconded, the jurisdiction take certain actions to investigate the absconder and notify various law enforcement agencies.

South Dakota meets all of the SORNA requirements in this section.

#### **XIV. Tribal Considerations**

The South Dakota Division of Criminal Investigation, which is part of the South Dakota Office of Attorney General, is the sex offender registration point of contact for tribes with lands located within the state boundaries.

South Dakota has nine federally recognized tribes located within its boundaries: the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, the Crow Creek Sioux Tribe of the Crow Creek Reservation, the Flandreau Santee Sioux Tribe of South Dakota, the Lower Brule Sioux Tribe of the Lower Brule Reservation, the Oglala Sioux Tribe of the Pine Ridge Reservation, the Rosebud Sioux Tribe of the Rosebud Indian Reservation, the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, the Standing Rock Sioux Tribe of North & South Dakota and the Yankton Sioux Tribe of South Dakota.



South Dakota shared with the SMART Office executed joint powers agreements with the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, the Crow Creek Sioux Tribe of the Crow Creek Reservation, the Flandreau Santee Sioux Tribe of South Dakota and the Standing Rock Sioux Tribe of North & South Dakota.

The joint powers agreements describe the arrangement by which the state and tribes share sex offender registration information. Pursuant to this arrangement, the state furnishes the tribes with sex offender registration information and DNA collection kits and performs DNA analysis on the tribes' behalf. In exchange, the tribes agree to register tribal member sex offenders who reside, work or attend school within the boundaries of the respective reservation. Pursuant to the joint powers agreements, non-tribal offenders working for the tribe or attending a school within the boundaries of the reservation must register with both the respective tribe and the applicable county authority designated under South Dakota CL 22-24B.

The South Dakota Division of Criminal Investigation developed the state's sex offender registration application and website and shares those resources with the tribes located within its boundaries that opt to use them.<sup>2</sup> Currently, six tribes use South Dakota's sex offender registration application: the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, the Crow Creek Sioux Tribe of the Crow Creek Reservation, the Flandreau Santee Sioux Tribe of South Dakota, the Lower Brule Sioux Tribe of the Lower Brule Reservation, the Oglala Sioux Tribe of the Pine Ridge Reservation, and the Rosebud Sioux Tribe of the Rosebud Indian Reservation.

The other three tribes — the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, Standing Rock Sioux Tribe of North & South Dakota and the Yankton Sioux Tribe of South Dakota — use their own sex offender registry applications.<sup>3, 4</sup> The Standing Rock Sioux Tribe of North & South Dakota forwards sex offender registration information to the South Dakota Division of Criminal Investigation for inclusion on the state's public sex offender registry website (in addition to displaying the information on its own public sex offender registry website).

As the SMART Office continues to work with South Dakota on SORNA implementation and compliance assurance, we will notify the SORNA tribes within the state of any processes, policies or procedures that facilitate the sharing of criminal justice information.

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<sup>2</sup> The South Dakota Division of Criminal Investigation sex offender registration application serves as a conduit for state registry officials to submit sex offender registration information directly to NSOR, and extends this benefit to tribes using the application as well. The Standing Rock Sioux Tribe of North & South Dakota and Sisseton-Wahpeton Oyate of the Lake Traverse Reservation both participate in the Department of Justice's Tribal Access Program and are able to submit sex offender registration information and updates to NSOR without the state's assistance. Despite not using the state's sex offender registration application, the Yankton Sioux Tribe of South Dakota directly shares sex offender registration information and updates with the state for submission to NSOR.

<sup>3</sup> These tribes use the Tribe and Territory Sex Offender Registry System, a sex offender registration application provided by the SMART Office.

<sup>4</sup> Three tribes use both the state's sex offender registration application and the Tribe and Territory Sex Offender Registry System: the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, the Flandreau Santee Sioux Tribe of South Dakota and the Rosebud Sioux Tribe of the Rosebud Indian Reservation.

## **Conclusion**

South Dakota has performed exceptional work in substantially implementing SORNA and enhancing its sex offender registration and notification system. Thank you for a job well done. However, there remain provisions identified in this report that should be addressed in order for South Dakota to more seamlessly implement SORNA.

We encourage you to contact the SMART Office once you have had the opportunity to review and discuss our findings. Please let us know if we can be of assistance in developing a strategy for addressing and adopting the remaining provisions of SORNA.

## **Appendix: South Dakota Offense Tiering Policy Review**

The SMART Office has reviewed all of South Dakota's publically available state laws and practices related to sex offender registration and placed the state's criminal offense statutes within the tiering policy structure created in Title I of the Adam Walsh Child Protection and Safety Act of 2006, the Sex Offender Registration and Notification Act (SORNA).

In reviewing South Dakota CL 22-24B, the state's sex offender registration statutes, the SMART Office understands that South Dakota has one category of registrants for purposes of duration of registration and frequency of registration requirements.

South Dakota requires sex offenders to register for life and imposes the same registration verification requirements on all sex offenders regardless of the severity of the underlying registerable sex offense. South Dakota uses the term "tier" only in the limited context of classes of offenders that may petition for removal from the state sex offender registration.

### **SORNA Tier I Offenses**

SORNA requires tier I offenders register for a minimum of 15 years and annually verify registration information. The following offenses listed in South Dakota's sex offender registration statute would require, at a minimum, tier I registration requirements under SORNA.

- South Dakota CL 22-22-7 – Sexual contact with child under 16 (misdemeanor)
- South Dakota CL 22-24A-3 – Possession, manufacture or distribution of child pornography (possession of child pornography)

### **SORNA Tier II Offenses**

SORNA requires tier II offenders register for a minimum of 25 years and semi-annually verify registration information. The following offenses listed in South Dakota's sex offender registration statute would require, at a minimum, tier II registration requirements under SORNA.

- South Dakota CL 22-22-7 – Sexual contact with child under 16 (felony)
- South Dakota CL 22-23-2 – Promotion of prostitution (of a minor)
- South Dakota CL 22-24A-3 – Possession, manufacture, or distribution of child pornography (production or distribution of child pornography)
- South Dakota CL 22-24A-1 – Sale of child pornography
- South Dakota CL 22-22-24.3 – Sexual exploitation of minor
- South Dakota CL 22-24A-5 – Solicitation of minor
- South Dakota CL 22-49-2 – First degree human trafficking (of a minor)
- South Dakota CL 22-49-3 – Second degree human trafficking (of a minor)

### **SORNA Tier III Offenses**

SORNA requires tier III offenders register for life and quarterly verify registration information. The following offenses listed in South Dakota's sex offender registration statute would require, at a minimum, tier III registration requirements under SORNA.

- South Dakota CL 22-19-1 – Kidnapping (nonparental kidnapping of a minor)
- South Dakota CL 22-22-1(1) – Rape (if the victim is less than 13 years of age)
- South Dakota CL 22-22-1(2, 3 and 4) – Rape (through the use of force, coercion or threats of violence or the victim is incapable, because of physical or mental incapacity, of giving consent to such act)
- South Dakota CL 22-22-1(5) – Rape (if the victim is 13 years of age, but less than 16 years of age, and the perpetrator is at least three years older than the victim)
- South Dakota CL 22-22-7.2 – Sexual contact with person incapable of consent
- South Dakota CL 22-22-7.6 – Sexual acts between a jail employee and a detainee (if the victim is a minor)
- South Dakota CL 22-49-2 – First degree human trafficking (where offense involves nonparental kidnapping of a minor)

### **Further Review**

In reviewing the statutes South Dakota cited as those that are registerable offenses under South Dakota's registration scheme, the SMART Office noted several offenses are missing from those statutes for which SORNA requires registration. Those offenses are as follows:

- South Dakota CL 22-19-17 – False imprisonment (of a minor)
- South Dakota CL 22-21-4 – Use or dissemination of visual recording or photographic device without consent and with intent to self-gratify, harass or embarrass (where victim is a minor and photograph or visual recording constitutes child pornography)
- South Dakota CL 22-22-7.6 – Sexual acts between a jail employee and a detainee

In addition, South Dakota registers the following offenses; however, without the commission of (or the attempt or conspiracy to commit) a sexual offense, registration of these offenses exceed the minimum standards of SORNA, do not require registration under SORNA but in no way disserve the purposes of the SORNA requirements.

- South Dakota CL 22-18-31(1) – Criminal exposure to HIV
- South Dakota CL 22-22A-2 – Incest
- South Dakota CL 22-22-28 – Sexual contact with emotionally dependent patient by psychotherapist
- South Dakota CL 22-22-29 – Sexual penetration of emotionally dependent patient by psychotherapist
- South Dakota CL 22-22-42 – Bestiality
- South Dakota CL 22-24-1.2 – Indecent exposure
- South Dakota CL 22-24-1.3 – Indecent exposure involving a child