

Implementing the Adam Walsh Act's Sex Offender Registration and Notification Provisions

A Survey of the States

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Study Background and Purpose

With the 2006 passage of the Adam Walsh Child Protection and Safety Act (AWA), the U.S. Congress passed the most sweeping piece of federal sex offender legislation in over a decade. The AWA addressed an array of issues, including immigration law reform, expanded enforcement of internet crimes against children, enhanced sentencing provisions for certain crime types, and establishment of a new federal sex offender civil commitment statute. While each of these provisions has attracted some measure of legal and policy attention, a particularly wide-ranging series of concerns has emerged from Title I of the AWA, designated as the Sex Offender Registration and Notification Act (SORNA).

SORNA and its final guidelines – issued by the U.S. Department of Justice in July 2008 – set a date of July 2009 for covered jurisdictions (i.e. states, territories, and certain tribal entities) to achieve “substantial compliance” with SORNA provisions. Yet as this date approaches, the prognosis for successful implementation remains uncertain -- with SORNA requirements often deviating significantly from existing law and practice, some jurisdictions have hesitated to implement the law, amid concerns over cost, lack of research support, practicality, legal sustainability, and federal preemption of jurisdictional autonomy. Moreover, many jurisdictions that **have** attempted to comply have typically encountered significant legal obstacles that have precluded implementation of key provisions once enacted¹.

With these general issues as a backdrop, a multi-state survey was conducted during the fall of 2008 to evaluate the nature and magnitude of implementation challenges facing states as they chart their course of action related to SORNA requirements. The study aimed to develop a prognosis for successful implementation of SORNA, and to inform both state responses and potential modifications to federal law and/or administrative policy.²

Survey Scope

The SORNA implementation guidelines set forth a wide range of provisions associated with SORNA “substantial compliance.” Following consultation with several state-level officials involved in SORNA policy development, eight provision areas were identified for evaluation:

- The range of “covered offenses” requiring registration;
- Registration/notification for juveniles adjudicated delinquent for certain sex offenses;
- Requirements for offense-based classification systems;
- Retroactive application of registration requirements for designated offenders;
- Required data elements to be captured in the registry;
- Public access to registry information;
- Requirements related to the duration of registration; and
- Requirements related to the mandated frequency of registration updates.

¹ *ACLU of Nevada v. Masto*, 2:2008cv00822 (D. Nev., Oct. 7, 2008); *In re: Z.B.*, 2008 S.D. LEXIS 147 (November 5, 2008); *Doe v. Shurtleff*, 2008 U.S. Dist. LEXIS 73787 (D. Utah, Sept. 25, 2008)

² The survey included only states, and not territories or tribal jurisdictions. It should be noted, however, that one SORNA requirements placed on tribal entities have emerged as among the Act's more controversial features. While not addressed in the current survey, tribal concerns reflect a critical element of the SORNA picture, and warrant further detailed examination.

For each of these eight areas, the survey presented two rating matrices, the first evaluating the consistency between SORNA and current state policy and practice, and the second assessing the specific implementation challenges associated with achieving compliance with the SORNA guidelines in that area. The survey also inquired about state actions to date and probable future actions regarding SORNA compliance. Throughout the survey, respondents were prompted to provide clarifying comments where necessary.

Sample Selection

Survey participants were selected based on their familiarity with the AWA SORNA provisions and involvement in their respective states' current systems of registration & notification. They were identified through multiple sources, including an informal network of sex offender management officials, the attendee list from the 2008 SMART National Symposium on Sex Offender Management, and from official state websites. Some survey respondents were identified via secondary referrals from the initial round of contacts.

In most instances, respondents represented official state agencies directly involved in evaluating and/or coordinating their states' response to SORNA. In cases where such a representative was not accessible or identifiable, surveys were completed by legal or treatment professionals actively engaged in SORNA-related activity within their states.

As a means of improving response rates and quality of responses, survey participants were provided with assurances of confidentiality. Participants were asked for certain identifying information that was used for internal research purposes such as validation and clarification of survey responses. This information was removed from the data prior to analysis, and respondents were assured that it would not be disclosed in any publicly disseminated results or research findings. For this reason, neither individuals nor states are identified in these or any other reported results.

Survey Administration

The survey was conducted between September and November of 2008 via Survey Gizmo, an online survey tool. A companion website was set up to provide respondents with survey-related information including a hard copy of the survey and links to detailed information on the SORNA provisions referenced within the survey. Links to this website were set up within the survey to provide "one click" supplementary information access for survey respondents.

Selected respondents were approached directly via e-mail and provided with links to the online survey and to the supplementary information site. Additional follow-up e-mails and phone calls were made when necessary. Several survey responses were "team efforts" completed pursuant to consultation between several officials within a given state.

At least one representative of all 50 states was contacted for survey participation. A total of 37 responses were received, representing 35 states.³ Two states were omitted from the study when

³ In the two instances of dual responses, the response from the agency or individual more directly involved in SORNA policy and/or implementation was utilized for data analysis purposes.

their respective representatives explicitly declined to participate, citing confidentiality and political concerns. The remaining 13 states not included in the sample did not respond to either initial or follow-up contacts.

Of the 35 respondents included in these results:

- 18 (51.4%) represented agencies directly involved in management of their state's sex offender registry⁴
- 13 (37.1%) represented independent sex offender management or policy boards
- 7 (20%) represented the state Attorney General
- 5 (14.3%) were based within the Governor's office or part of a gubernatorial task force charged with SORNA implementation
- 4 (11.4%) were not directly affiliated with a state agency directly involved with SORNA implementation⁵

Survey Results

CONSISTENCY WITH EXISTING STATE LAW AND PRACTICE

For each of the eight noted SORNA provision areas, respondents were asked to evaluate the consistency between SORNA requirements and existing state policy within two domains:

1. **Legal/statutory domain:** Consistency between SORNA provisions and **existing state law** (i.e. the extent to which legislative and/or state constitutional changes would be necessary to achieve compliance with the provision).
2. **Administrative/regulatory domain:** Consistency between SORNA provisions and **existing practice** (i.e. the extent to which changes to registration systems, agency responsibilities, and administrative procedures would be necessary to achieve compliance with the provision).

Respondents were asked to rate SORNA consistency with existing state law and practice based on the following 4-point scale:

- **Highly Inconsistent:** Provision is in direct contradiction with existing law, policy, or practice. Compliance requires a radical shift in state policy.
- **Moderately Inconsistent:** Provision substantively differs from existing law, policy, or practice. Compliance requires a significant shift in state policy.
- **Partially Consistent:** Provision partially reflects existing law, policy, or practice. Compliance requires some modest adjustments to state policy.
- **Consistent:** Provision reflects or closely approximates existing law, policy, and practice. Compliance requires minor adjustments or no adjustments to state policy.

⁴ Note many involved with their state registries also had another organizational affiliation. Hence, the percentages cited here are not additive.

⁵ These included one public defender, two treatment providers, and one private attorney, all of whom have been actively engaged in SORNA activity within their states.

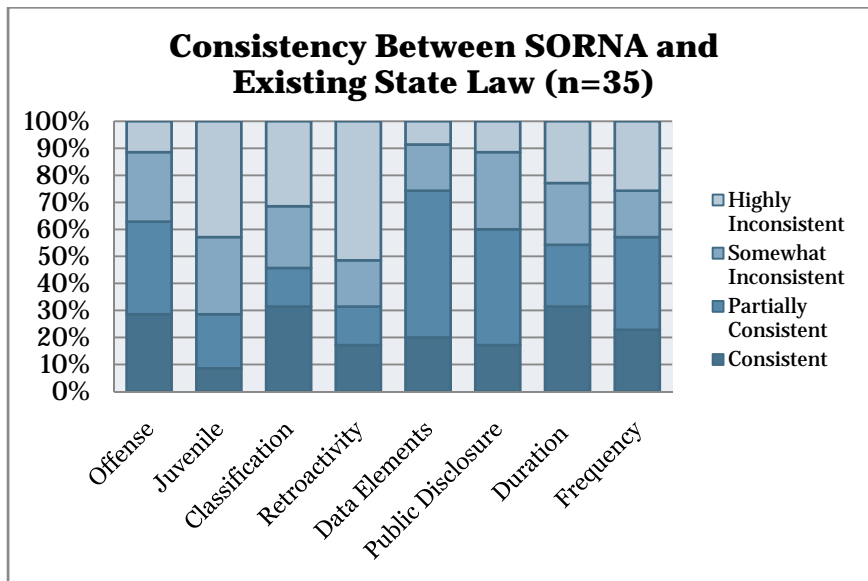
Table 1: Consistency Between SORNA and Existing State Policy

	Consistency with Existing Law		Consistency with Existing Practice	
	Mean	Median	Mean	Median
Covered Offenses	1.20	1	1.20	1
Juveniles	2.06	2	2.06	3
Classification	1.54	2	1.54	2
Retroactivity	2.03	3	2.14	3
Data Required	1.14	1	1.14	1
Public Disclosure	1.34	1	1.34	1
Duration	1.37	1	1.37	1
Update Frequency	1.45	1	1.43	1
<i>0= Consistent, 3= Highly Inconsistent</i>				

Table 1 presents the mean and median consistency ratings for each of the eight provision areas, with a rating of “zero” indicating general consistency between SORNA and existing state policy, and a rating of “3” representing a high level of inconsistency. These data suggest that, on a comparative basis, SORNA’s juvenile provisions, classification requirements, and retroactivity provisions present the highest average rates of inconsistency, with the range of covered offenses and the scope of required registry information rated as the most consistent. In

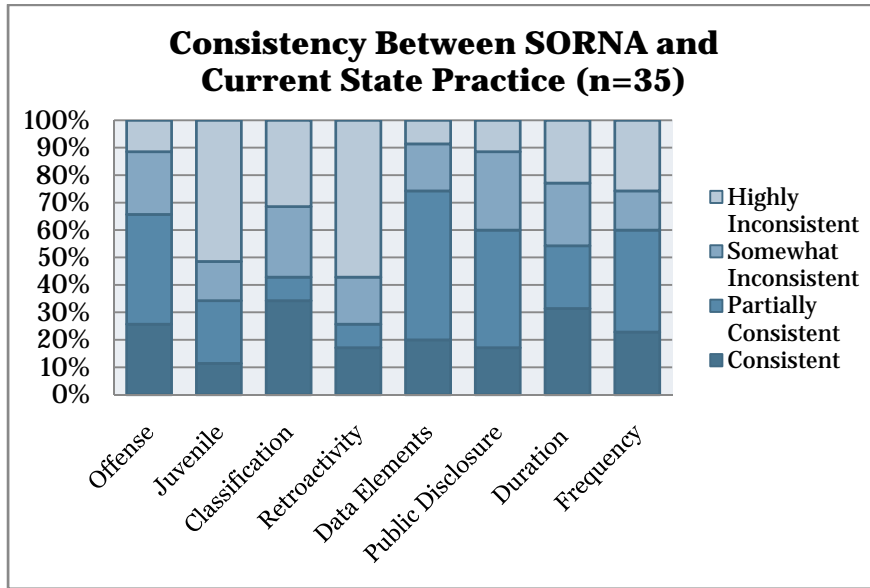
general, SORNA’s juvenile and retroactivity provisions deviate from state policy in a more consistent fashion (reflected in both the mean and median values), while the offense-based classification figures are largely driven by a more polarized split among the states.⁶

Figure 1: Distribution of Legal Consistency Ratings



⁶ Notably, the modal groups in this category (each consisting of 11 states) were those rating existing practice as consistent and highly inconsistent, reflecting the divide between states utilizing “offense-based” and “risk-based” systems of classifying offenders.

Figure 2: Distribution of Practice Consistency Ratings



Figures 1 and 2 present the distribution of consistency ratings for each of the provision areas. Regarding offense-based classification, the charts indicate that a majority of states (54% in the legal domain and 57% in the practice domain) maintain systems that are rated somewhat inconsistent or highly inconsistent with SORNA requirements. While these charts further suggest that covered offenses and required registry information are comparatively less problematic, they indicate that most provision areas continue to present significant areas of inconsistency for many states.

The required road to substantial compliance may be further understood by examining the number of provisions that individual states must address to meet SORNA standards. The data presented in Table 2 indicate that 89% of the states -- all but four -- identified at least one provision as highly inconsistent with existing practice, more than half (54%) identified two or more such areas, and more than one third (37%) identified three or more. Including ratings of “somewhat inconsistent” in the analysis, **all** responding states identified at least one inconsistent provision area, and over three quarters (77%) identified three or more such areas.

Table 2: Number of SORNA Provisions per State Designated as Inconsistent with Existing Practice

# Ranked Inconsistent	Highly Inconsistent			Highly or Somewhat Inconsistent		
	# of States	%	Cumulative %	# of States	%	Cumulative %
8 Provisions	0	N/A	N/A	2	6%	6%
7 Provisions	0	N/A	N/A	0	N/A	6%
6 Provisions	1	3%	3%	5	14%	20%
5 Provisions	3	9%	12%	8	23%	43%
4 Provisions	5	14%	26%	2	6%	49%
3 Provisions	4	11%	37%	10	29%	77%
2 Provisions	6	17%	54%	2	6%	83%
1 Provision	12	34%	89%	6	17%	100%
None	4	11%	100%	0	N/A	N/A

Implementation Barriers

Given that many state policies remain significantly out of synch with SORNA, the next series of questions concerns the impediments to substantial compliance – i.e. what are the specific areas of concern that have precluded (or may preclude) SORNA-related state action?

To evaluate the potential implementation barriers related to each provision, respondents were asked to rate the level of concern within their states across four domains:

1. **Legal Domain:** Concern that provision's implementation may be constrained by legal (i.e. state or federal constitutional) challenges
2. **Management/Operational Domain:** Concern that provision's implementation may be constrained by operational factors such as agency roles, capacity of information systems, and standing policies and procedures
3. **Financial Domain:** Concern that provision's implementation may be constrained by costs and unmet resource demands
4. **Practical Domain:** Concern that provision's implementation may produce adverse collateral public safety consequences

For each provision and within each domain, level of concern was rated using these criteria:

- **Very Significant Concern:** Provision faces major implementation barriers.
- **Significant Concern:** Provision faces substantial, but potentially surmountable, implementation barriers.
- **Minimally Significant Concern:** Provision faces limited and surmountable implementation barriers.
- **No Concerns:** Provision faces minimal or no implementation barriers..
- **Uncertain (N/A):** Respondent does not have the appropriate knowledge or information to assess implementation barriers.

Table 3: Mean Implementation Barrier Ratings (All valid responses)

	Legal Concerns	Operational Concerns	Financial Concerns	Practical Concerns
Covered Offenses	1.62	1.59	1.94	1.24
Juveniles	2.16	1.73	1.72	1.97
Classification	1.61	1.36	1.59	1.62
Retroactivity	2.12	2.28	2.22	1.79
Data Required	1.29	1.30	1.59	1.24
Public Disclosure	1.33	1.09	1.29	1.39
Duration	1.12	1.03	1.12	1.18
Update Frequency	0.97	1.32	1.65	1.26
<i>0= No Concerns, 3=Very Significant Concern</i>				

Table 4: Mean Implementation Barrier Ratings (Inconsistent States Only)

	Legal Concerns	Operational Concerns	Financial Concerns	Practical Concerns
Covered Offenses	2.36	1.80	2.40	1.45
Juveniles	2.24	2.09	1.95	2.15
Classification	2.37	2.11	2.33	2.40
Retroactivity	2.58	2.58	2.52	2.12
Data Required	2.22	2.33	2.56	2.13
Public Disclosure	1.64	1.38	1.60	1.69
Duration	1.75	1.47	1.53	1.47
Update Frequency	1.50	2.08	2.46	1.77
<i>0= No Concerns, 3=Very Significant Concern</i>				

Tables 3 and 4 provide mean ratings across these four domains for each of the eight provision areas. Table 3 includes aggregate ratings for all valid responses (responses of “uncertain” were excluded from the analysis), while the figures in table 4 reflect only the responses from states rating the particular provision as either “somewhat inconsistent” or “highly inconsistent” with existing state practice.

Legal Barriers

Concerns over actual or potential legal impediments to SORNA implementation were prominent across multiple provision areas. Four of these areas – the expansion of covered offenses, the inclusion of certain classes of juveniles, the reclassification of individuals into offense-based tiers – share a common thread, in that all directly relate to the “widening of the net” of individuals subject to registration/notification. This, in turn, has led to significant concern among states regarding conflicts with state constitutional provisions and with potential federal legal challenges related to alleged ex post facto, equal protection, and due process violations.

Operational Barriers

States expressed concern regarding potentially significant operational impediments in several provision areas. One particularly prominent operational concern involved states’ lack of capacity to adapt to the retroactivity provisions, specifically those requiring the identification and registration of individuals who enter the criminal justice system on a non-sexual offense, but who had previous sexual offense convictions. Several states provided comments indicating that such information is not readily available within their information systems, making compliance particularly problematic. Other areas of operational concern relate to the demands associated with transitioning from risk-based to offense-based systems, IT enhancements related to expanded data requirements, and the adaptation of registration update systems and personnel to respond to increased workloads.

Financial Barriers

Closely related to both operational and legal demands, resource requirements emerge as a vital theme across several provision areas. Several states have completed detailed fiscal analyses that have identified a wide range of SORNA-related costs including system development, reclassification, expanded enforcement personnel, judicial and correctional costs, and legal costs related to prosecution, defense, and litigation. While jurisdictions remain eligible to cover some initial start-up costs through Department of Justice grant programs authorized by AWA, state analyses have suggested substantial ongoing operational costs, primarily local law enforcement-related expenses associated with the “widened net” of individuals and the expansion of reporting requirements.

The fiscal calculus of compliance has taken a decidedly profound twist with the substantial reduction of federal Byrne Grant formula funding in the federal fiscal year 2008 budget. As a means of compelling jurisdictions to comply with the SORNA requirements, Congress had stipulated that states found not in compliance would be penalized with a 10% annual reduction in their Byrne formula funding. Yet with FY08 Byrne funds reduced to approximately 1/3 of their prior levels, many states now find the costs of the non-compliance penalty to be significantly lower than the costs of bringing their policies into SORNA compliance.

Practical Barriers

In this final domain, respondents were asked to evaluate the potential adverse public safety impacts of modifying their existing state policies to meet SORNA requirements. Two provision areas emerged as particularly problematic – the inclusion of adjudicated juveniles and the requirements for offense-based classification. Regarding the former, states expressed concern that registration of juveniles undermines the concepts of juvenile justice and significantly compromises the potential for these youth to effectively and safely integrate into society.⁷ As for the latter, states currently differentiating registration and notification levels according to standardized and empirically validated risk assessment instruments have expressed significant concern that differentiating offenders based solely on the crime of conviction dramatically compromises the ability to focus enforcement resources on the most dangerous offenders.

Substantial Compliance Activity

Following completion of the rating matrices, respondents were asked two questions regarding substantial compliance activity – the first addressing the present status of their SORNA compliance-related activity and the second addressing their actions or planned actions regarding Department of Justice (DOJ) substantial compliance review. The results are presented in Tables 5 and 6.

The data presented in Table 5 suggest that nearly half of all states responding had yet to determine a specific course of action regarding SORNA compliance. Another 43% consisted of states indicating that they had taken some definitive steps such as the passage of legislation (25.7%) and those planning to pass legislation (17.1%).

⁷ This is compounded by concerns that most adjudicated juveniles covered under SORNA will end up in the “Tier III” category, which involves lifetime registration.

Table 5: Compliance Activity Status

Actions to Date	Frequency	Percent
State/jurisdiction has concerns with certain aspects of the guidelines, but is continuing to weigh the costs and benefits of full compliance.	17	48.6%
State/jurisdiction has made all necessary adjustments to fully comply with SORNA guidelines as written, pending SMART office approval.	1	2.9%
State/jurisdiction has made an affirmative decision to maintain current policies that conflict with certain aspects of the guidelines	1	2.9%
State/jurisdiction has taken definitive steps to bring policy in line with guidelines (for example, passage of legislation), and is on a path to full compliance pending additional adjustments to state policy and/or practice.	9	25.7%
State/jurisdiction most likely will comply with provisions, but has not yet taken definitive action to adjust state policy and/or practice.	6	17.1%
No Reponse	1	2.9%

While these data suggest that many states have taken some steps toward compliance, Table 6 indicates that relatively few are likely to bring their policies into full compliance by the statutory deadline. Excluding the two states that have been deemed by DOJ as non-compliant (one of these states has already requested and been granted an extension), only five states in the sample indicated a likelihood of submitting substantial compliance packages to DOJ by July 2009, with a significant majority expected to submit extension requests.

Table 6: Activity Regarding Department of Justice Review

Substantial Compliance Activity	Frequency	Percent	Valid Percent
Uncertain	6	17.1%	N/A
Extension Request Likely	19	54.3%	65.5%
Extension Request Submitted	2	5.7%	6.9%
No Action Likely	1	2.9%	3.4%
Submission Likely	4	11.4%	13.8%
Submitted No Ruling	1	2.9%	3.4%
Submitted Non-compliant	2	5.7%	6.9%

Data Limitations

While the findings set forth in this report provide a sound foundation for understanding the range of issues confronted by state policymakers and practitioners as they contemplate SORNA compliance, certain caveats regarding the data should be noted.

Perhaps the most significant issue pertains to the relatively diverse nature of the respondent pool, and the potential effects of this diversity on the assessment of implementation barriers. While a significant number of responses were completed pursuant to multi-disciplinary consultation, it is likely that respondent background may have had some impact on the results. Consistent with the adage “where you stand depends on where you sit,” respondents from Attorney General’s offices may have placed greater emphasis on legal concerns, while those

charged with management of sex offender registries may have been more attuned to operational and resource issues.

Regarding the 15 states that did not respond to the survey, potential certainly exists that these states may have been qualitatively different than those that did respond. It should be noted, however, that secondary data suggests that several of these states (including the two that categorically declined to participate) maintain substantial reservations about several aspects of SORNA, including its rejection of risk-based classification and its potential adverse impacts on juvenile justice populations.

Summary and Conclusions

The above limitations notwithstanding, the results of this survey may be boiled down to three main points:

1. Two and a half years following the passage of SORNA, substantial gaps remain between SORNA requirements and existing state law and practice;
2. The impediments associated with bridging these gaps are extensive and multi-dimensional;
3. State "substantial compliance" activity has remained severely limited, with few (if any) states likely to come into compliance by the July 2009 deadline.

These circumstances may be explained, at least in part, through critical historical distinctions between SORNA and the prior generation of federal registration and notification legislation. When Congress passed the Jacob Wetterling Act in 1994 and Megan's Law in 1996, state registration and notification laws and systems were in their relative infancy. In contrast with SORNA's highly prescriptive nature, federal legislation of the mid-90's set forth general requirements for registration and notification, and laid the groundwork for state-based laws and practices. Over the following decade, states invested considerable resources and energy adapting their systems to respond to jurisdictional public safety demands, emerging research evidence, and their respective state laws.

With SORNA, states have found this evolutionary trajectory significantly interrupted, with many perceiving the new law and guidelines as "turning the clock back" on over a decade of progress. States utilizing "risk-based" offender classification now must transition to a uniform "offense-based" system that, some have argued, may compromise public safety through its reduced discriminatory value. SORNA's provisions requiring the registration of juveniles adjudicated delinquent for certain offenses represents another key point of contention, with critics contending that the provisions undermine the core principles of juvenile justice. SORNA also requires that many states make major revisions to their laws and policies in areas such as retroactive application of registration, public/internet notification, and the range of covered offenses.

Considering these issues, it is not surprising that state-level SORNA compliance activity appears to be moving at a relatively slow pace. This survey suggests that a majority of states remain significantly out of synch with certain SORNA requirements, and that most do not expect to come into substantial compliance prior to the July 2009 statutory deadline. While most of these states will request extensions, and there will likely be some discussion of SORNA during upcoming state legislative sessions, these data suggest that most states have adopted a "wait and see" approach to SORNA compliance.

Fiscal and legal realities within the states appear to have further hamstrung movement toward SORNA compliance. The contraction of state revenues associated with the current economic downturn has frozen new spending in many states, limiting capacity to undertake the significant system modifications, expanded enforcement tasks, and potential litigation stemming from overhauled R & N systems. On the legal front, not only have certain states been directly precluded by the court rulings from moving forward with SORNA-driven system changes, but these rulings are likely producing a spillover effect to other states contemplating modifications to their own R & N policies.

This limited movement at the state level has been complemented by an apparent inertia within the Department of Justice's SMART Office regarding substantial compliance determinations.⁸ As of early December, SMART had received five substantial compliance packages – four were found to be not in compliance (Arizona, Idaho, Louisiana, and Guam), and the fifth (Ohio) has had its determination pending since June 2008. Of the eight requests for extensions submitted to SMART as of early December, it had approved three (Arizona, Guam, and Kansas), with the rest remaining under review.⁹ The limited federal activity on the substantial compliance front is likely to be temporarily compounded by the January 2009 change in DOJ administration.

Considering this confluence of factors – continued (and extensive) discrepancies between SORNA guidelines and existing state policies; a multi-faceted array of implementation barriers; mounting constitutional challenges; the fiscal realities facing the states and the federal government; rising voices of concern regarding SORNA's potential collateral public safety consequences; and limited state and federal action on the "substantial compliance" front – the future of SORNA as currently framed is at best uncertain, and at worst untenable. Whether through Congressional legislative amendment, modification of DOJ policies and guidelines, or a combination of the two, significant additional federal action seems in order.

⁸ SMART (an acronym for Sex Offender Sentencing, Monitoring, Apprehension, Registering, and Tracking), which operates within the DOJ's Office of Justice Programs, is charged by SORNA with evaluating and certifying states' compliance with SORNA.

⁹ Information provided by DOJ pursuant to Freedom of Information Act request, on file with author.

SUPPLEMENTAL TABLES

PRACTICE CONSISTENCY

Provision Category		Highly Inconsistent	Somewhat Inconsistent	Partially Consistent	Consistent
Covered Offenses	N	4	8	14	9
	%	11.4%	22.9%	40.0%	25.7%
Juvenile	N	18	5	8	4
	%	51.4%	14.3%	22.9%	11.4%
Classification	N	11	9	3	12
	%	31.4%	25.7%	8.6%	34.3%
Retroactivity	N	20	6	3	6
	%	57.1%	17.1%	8.6%	17.1%
Data Elements	N	3	6	19	7
	%	8.6%	17.1%	54.3%	20.0%
Public Disclosure	N	4	10	15	6
	%	11.4%	28.6%	42.9%	17.1%
Duration	N	8	8	8	11
	%	22.9%	22.9%	22.9%	31.4%
Frequency	N	9	5	13	8
	%	25.7%	14.3%	37.1%	22.9%

LEGAL CONSISTENCY

Provision Category		Highly Inconsistent	Somewhat Inconsistent	Partially Consistent	Consistent
Covered Offenses	N	4	9	12	10
	%	11.4%	25.7%	34.3%	28.6%
Juvenile	N	15	10	7	3
	%	42.9%	28.6%	20.0%	8.6%
Classification	N	11	8	5	11
	%	31.4%	22.9%	14.3%	31.4%
Retroactivity	N	18	6	5	6
	%	51.4%	17.1%	14.3%	17.1%
Data Elements	N	3	6	19	7
	%	8.6%	17.1%	54.3%	20.0%
Public Disclosure	N	4	10	15	6
	%	11.4%	28.6%	42.9%	17.1%
Duration	N	8	8	8	11
	%	22.9%	22.9%	22.9%	31.4%
Frequency	N	9	6	12	8
	%	25.7%	17.1%	34.3%	22.9%

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