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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

April 30, 2007

Via email: olpregs@usdoj.gov

Attn: Mr. David J. Karp, Senior Counsel
Office of Legal Policy
Room 4509, Main Justice Building
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Re: NACDL Comments on OAG Docket No. 117; the Attorney General's Interim Rule Applying the Provisions of the Adam Walsh Act (Pub. L. 109-248) Retrospectively to Offenders Whose Convictions Pre-Date The Enactment of the Legislation

I. Introduction

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit, voluntary association of criminal defense lawyers founded in 1958 to improve the quality of representation of the accused and to advocate for the preservation of constitutional rights in criminal cases. The NACDL has a membership of more than 12,800 attorneys and 92 state, local and international affiliate organizations with another 35,000 members including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. In these comments NACDL urges the Attorney General to repeal 28 CFR Part 72 because the regulation, as promulgated, violates the ex post facto clause of the Constitution, and will cause widespread confusion and instability in the efforts of many convicted sex offenders to comply with the law and maintain a non-offending lifestyle.

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II. The Sex Offender Registration and Notification Act

Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, contains the Sex Offender Registration and Notification Act (SORNA). SORNA imposes direct registration requirements on convicted sex offenders subject to federal jurisdiction. See, SORNA § 111. The act also places certain community notification responsibilities on the states. See, SORNA § 121. SORNA expands the definition of the term “sex offense” to include offenses involving kidnapping and false imprisonment of children and solicitation of children to engage in sexual contact and prostitution. See, SORNA § 111 (7). Section 111 (8) of SORNA expands the definition of sex offender to include certain juveniles.

SORNA generally requires the states to conform their sex offender registration laws to the SORNA requirements at the risk of losing federal funding for certain programs. SORNA requires states to enact laws that make a failure to register an offense punishable by more than one year of incarceration - in other words - a felony in most jurisdictions. See, SORNA § 113 (d). SORNA also requires that all states maintain certain information in their registries to include photographs and DNA samples.

SORNA delegates to the Attorney General the authority to specify the applicability of the act to sex offenders convicted before the enactment and implementation of the act. See, SORNA § 113(d). On February 16, 2007, the Attorney General promulgated 28 CFR Part 72, an interim rule, which extends the provisions of SORNA to sex offenders whose convictions pre-dated the enactment of the act. The regulation was published in the Federal Register on February 28, 2007. 72 Fed. Reg. Vol. 39, 8894.

III. The Interim Rule Violates the Ex Post Facto Clause

28 CFR Part 72, as promulgated, mandates that the provisions of the Sex Offender Registration and Notification Act be applied retroactively to sex offenders whose convictions occurred before the enactment of SORNA and the Adam Walsh Child Protection and Safety Act of 2006. 28 CFR 72.3. The National Association of Criminal Defense Lawyers urges the Attorney General to re-draft the regulation. As written, the regulation violates the ex post facto provisions of Part, I, Article 9 of the Constitution.

The supplementary information provided by the Attorney General broadly states that applying SORNA to sex offenders whose convictions pre-dated the enactment of the Adam Walsh Act does not offend the ex post facto provision of the Constitution because it creates “registration and notification provisions that are intended to be non-punitive, regulatory measures adopted for public safety reasons.” 72 Fed. Reg. Vol. 39, 8896. The Attorney General relies on *Smith v. Doe*, 538 U.S. 84 (2003) for this proposition. In *Smith* the Supreme Court upheld the provisions of the Alaska Sex Offender Registration Act (ASORA) against an ex post facto challenge. In fact SORNA is a federal statute that is punitive and therefore the ex post facto provision of Article I Section 9 of the Constitution does apply. SORNA goes well beyond the Alaska Sex Offender Registration Act that was considered by the Court in *Smith*.

a. The Extensive Community Notification Provisions of SORNA Publicly Disgrace and Humiliate the Registered Offender in His or Her Community

One consideration in determining whether a law is punitive is whether it is the type of law that our history and traditions consider to be punishment because it publicly disgraces the offender. Although ASORA and SORNA are similar in some respects, SORNA goes considerably beyond ASORA in its community notification requirements. SORNA requires that

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an appropriate state official provide an offender's registration information to the Attorney General (for inclusion in the federal list) and to appropriate law enforcement and probation agencies. However, SORNA also requires the state to notify 1) "each school and public housing authority in the area in which the individual resides, is employed or is a student;" 2) "each jurisdiction where the sex offender resides, is an employee, or is a student and each jurisdiction from or to which a change of residence, employment, or student status occurs;" 3) "any agency responsible for conducting employment-related background checks under section 3 of the National Child Protection Act of 1993 (42 U.S.C. 5119a);" 4) "social service entities responsible for protecting minors in the child welfare system;" and, 5) "volunteer organizations in which contact with minors or other vulnerable individuals might occur." See, SORNA, § 121. These additional community notification measures render SORNA a punitive statute subject to ex post facto constitutional prohibition. In *Smith* the Court specifically addressed the shaming aspects of publication of registration information on the Internet. The Court described Internet publication as "more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Smith* at p. 99. SORNA provides far more public humiliation and shame than the mere review of criminal records at an archive. It requires the states to take affirmative actions to report the registration information throughout the community, even to those who might otherwise not seek such information. The SORNA requirements are far more akin to a scarlet letter or a wanted poster than they are to a trip to a central registry of government documents. SORNA is far more likely to inflict public disgrace than the provisions of the Alaska law considered by the Court in *Smith*. Our history and traditions consider such public disgrace and humiliation as punishment and thus invoke the requirements of the ex post facto clause. The interim rule violates the ex post facto

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clause because it extends these punitive measures to individuals whose offenses pre-dated the enactment of the statute.

b. SORNA Imposes Affirmative Restraints and Disabilities on the Offender

Unlike the Alaska statute considered in *Smith*, SORNA requires the personal appearance of the sex offender between one and four times per year depending upon his or her tier classification. See, SORNA, § 116. The requirement of periodic in-person appearance and verification imposes significant restraint on individual liberty and is a hallmark of traditional supervisory punishment such as probation and parole. Such a restraint on liberty is one of the primary factors to be considered in determining whether a statute is punitive rather than merely regulatory. See, *Smith* at p. 101; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). The *Smith* court specifically noted that periodic updating of registration information under the Alaska scheme need not occur by personal visit and therefore did not create a restraint or disability. *Id.* SORNA, on the other hand, does specifically require periodic in-person appearance, verification of information and photographing. See, SORNA, § 116. This requirement imposes a substantial restraint and disability upon the individual subject to the act's requirements rendering the act to be a punitive measure subject to the ex post facto clause.

The extensive community notification provisions discussed above also serve to significantly and affirmatively cause restraint and disability on individual liberty. Such "outreach" efforts on the part of the government are likely to create a modern day equivalent of banishment which will substantially restrict the offender's ability to live and work in the community of his or her choice and to obtain and maintain employment.

SORNA goes well beyond the Alaska scheme that the Court upheld in *Smith*. SORNA imposes significant affirmative restraint and disabilities on the individual liberty of the offender

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rendering the statute to be punitive and subject to the prohibitions of the ex post facto clause of the Constitution. The interim rule, in applying SORNA to persons whose offenses pre-dated the enactment of the statute, violates the ex post facto clause.

IV. Application of the Interim Rule Will Cause Widespread Confusion and May Tend to Destabilize Offenders Who Have Paid Their Debt to Society and Are Living Productive, Non-Offending Lifestyles

Sex offenders generally demonstrate lower rates of recidivism than other criminals. See, U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Sexual Offenders Released from Prison in 1994*, November 2003; See also, Hanson R.K. and Morton Bourgon, R.K., *Predictors of Sexual Recidivism: An Updated Meta-Analysis*, Public Safety and Emergency Preparedness Canada (2004); Harris and Hanson, *Sex Offender Recidivism: A Simple Question* (2004); Hanson, R.K. and Bussiere, M., "Predicting Relapse: A Meta-Analysis of Sex Offender Recidivism Studies," *Journal of Consulting and Clinical Psychology* (1998). The interim rule renders SORNA applicable to all persons convicted of a sex offense without consideration of the age of that offense or the individual risk that any particular offender may pose to the community. Given sex offenders' lower rates of recidivism, this is bad policy. It exposes former offenders who have been law-abiding for years to the new requirements and public humiliation, disgrace and embarrassment. Former offenders, through the community notification provisions of SORNA, will be subjected to the likely loss of employment and housing despite their effective rehabilitative efforts and years of positive contributions to society. Secure employment, housing, and a supportive network of family and treatment are important factors in ensuring rehabilitation of an offender. Social science research demonstrates that sex offenders are more likely to re-offend in the absence of such stabilizing influences. See, Kruttschnitt, C., et al., "Predictors of Desistance among Sex Offenders: The Interaction of

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Formal and Informal Social Controls,” 17 Justice Quarterly 61 (2000). The retrospective application of SORNA to former offenders may disrupt substantial numbers of former offenders who have paid their debt to society and settled into law-abiding lifestyles. Rather than making society safer, retrospective application of SORNA makes society less safe.

It is important to recognize that SORNA does have a clean record reduction provision which permits some Tier I and Tier II offenders to decrease the time period of registration. See, SORNA, §115. However, the clean record provision would still require former offenders to register for a reduced period of time before exemption based upon a clean record. Neither the act nor the interim rule provide a mechanism for a former offender to demonstrate that he has already complied with the clean record requirements and therefore should not now be subject to the registration requirements. In short, former offenders get no credit for their rehabilitative efforts and law-abiding lifestyle, which in many cases has extended over many years. The interim rule is extremely unfair to such individuals. At the very least the interim rule should be amended to permit individuals with convictions that pre-date SORNA to avoid registration upon demonstrating that they have complied with the “clean record” provisions of the statute.

Finally, it is clear that the retroactive application of SORNA will cause significant confusion and enforcement problems in the states. Some states may have difficulty in identifying former offenders with old convictions. Former offenders will likely be confused as to the application of the new law in their individual situations. There will be significant problems with notifying former offenders who are no longer under the supervision of a probationary sentence or parole. If SORNA is to be applied retroactively, at all, it would be wise for the Attorney General to limit the retrospective application of SORNA only to offenders who remain under court, probation or parole supervision.

V. Conclusion

The interim rule 28 CFR 72.3 violates the ex post facto provisions of the Constitution and will tend to make society less safe. Therefore the rule should be repealed and the requirements of SORNA applicable only to those convicted after its enactment.