

Legislative Analysis



SEX OFFENDER REGISTRATION REVISIONS

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Senate Bill 188 with House committee amendments

Senate Bill 189 with House committee amendments

Senate Bill 206 as introduced

Sponsor: Sen. Phil Pavlov

House Committee: Judiciary

Senate Committee: Judiciary

First Analysis (3-22-11)

BRIEF SUMMARY: Together, Senate Bills 188 and 189 would revise the Sex Offenders Registration Act to conform to mandates under the federal Sex Offenders Registration and Notification Act, part of the Adam Walsh Act. Senate Bill 189 would also repeal two obsolete sections of the act. Senate Bill 206 would incorporate in the sentencing guidelines a change in the maximum sentence for failing to update registration information or report as scheduled.

FISCAL IMPACT: Senate Bills 188 and 189 would have an indeterminate fiscal impact on state and local governments, and Senate Bill 206 would have no fiscal impact on either as discussed later in the analysis. As noted later, in *Fiscal Information*, if these bills do not become law, the state may lose up to 10% in Federal Byrne Grant funds.

THE APPARENT PROBLEM:

The federal Adam Walsh Child Protection and Safety Act (AWA) was enacted in 2006. One provision of the AWA created the Sex Offender Registration and Notification Act (SORNA), which mandates a national sex offender registry and establishes a set of minimum standards for sex offender registration and notification with which each state must comply. Failure to comply with SORNA will result in a state losing 10 percent of Byrne Justice Grant funding used to support law enforcement efforts. Numerous provisions of the federal act (SORNA) are different from those in the state Sex Offenders Registration Act; therefore, legislation is needed to revise the statute to conform to the requirements of SORNA. Though SORNA allows states some latitude, the legislation must conform substantially to SORNA in order to continue to receive the full grant amount.

THE CONTENT OF THE BILLS:

Currently, a person who is convicted or found responsible for certain listed offenses is required to register with law enforcement and is placed on the sex offenders registry for a minimum of 25 years; serious offenses require registration for life. Recent amendments allowed for certain juvenile offenders to petition to shorten the time they are required to register. The Michigan State Police (MSP) maintains one database for law enforcement purposes and another less comprehensive one that is accessible to the public. Individuals

who fail to comply with the registration and reporting requirements of the act are subject to criminal penalties.

Senate Bills 188, 189, and 206

With the exception of one provision in Senate Bill 188, the legislation would take effect July 1, 2011. (That exception is a provision that would require the Michigan State Police to mail a notice to each individual registered under the current act who is not currently incarcerated in a prison explaining the individual's duties under the act as amended, and it would take effect immediately). Senate Bills 188 and 189 are tie-barred to each other and Senate Bill 206 is tie-barred to Senate Bill 189.

The bills are intended to apply to currently registered sex offenders, offenses for which the prosecution is pending or has not yet begun as of the legislation's effective date, and offenses committed after the effective date. However, as currently worded, the bills would be prospective in nature, applying only to offenses committed after the effective date or committed before that date but for which the prosecution is pending or has not yet begun.

Significant changes to the Sex Offenders Registration Act (SORA) by Senate Bills 188 and 189 include the following:

Offenses requiring registration

- Revise the definition of "convicted" to include offenders assigned to youthful trainee status before October 1, 2004, if they are convicted of any other felonies after July 1, 2011; exclude offenders assigned to youthful trainee status whose petition under current law to reduce the time required to register as a sex offender has been granted; and include offenders adjudicated as juveniles only if they were at least 14 years of age at the time of the offense and the order of disposition was for a Tier III offense.
- Redefine "listed offense" to instead mean a Tier I, Tier II, or Tier III offense, with Tier I being the least serious, and define those terms. (See ***Background Information***)
- Require a registration period of 15 years for a Tier I offense, 25 years for a Tier II offense, and life for a Tier III offense.
- Require Tier I offenders to report annually, Tier II offenders to report twice a year, and Tier III offenders to report quarterly.
- Exclude from certain Tier II offenses consensual incidents involving a minor victim who was at least 13 years of age but less than 16 if the actor was not more than 4 years older, and also certain offenses involving a minor victim who was 16 or 17 years of age and who was not under the custodial authority of the actor at the time of the violation. Define "custodial authority."
- Exclude from certain Tier III offenses consensual incidents involving a minor victim who was at least 13 years of age but less than 16 if the actor was not more than 4 years older.
- Define "minor" as a victim of a listed offense who was less than 18 years at the time of the offense.

- Exclude from registration those offenses that involve a consensual relationship between parolees or probationers with Department of Corrections' employees or employees of a county sheriff's office if no position of authority over the victim was used to coerce or otherwise encourage the victim to engage in sexual conduct.

Registration requirements

- Extend the jurisdictions in which registration is required so as to include federally recognized Indian tribes that elect to function as a registration jurisdiction.
- Redefine "residence" to mean the village, city, or township where a homeless person spends the majority of time to make it easier for the homeless or individuals without a permanent residence to comply with reporting requirements.
- Extend the registration and reporting requirements to an individual who was previously convicted of a listed offense but who, at that time, was not required to register under the SORA but who is convicted of any other felony on or after July 1, 2011.
- Shorten the time period required for registering or reporting status changes for various scenarios from 14 days or 10 days to "immediately" and define that term to mean 3 business days.
- Require a nonresident convicted of a listed offense in Michigan on or after July 1, 2011, to register under the act; the reporting requirements would not apply as long as the person remains a nonresident. The nonresident would have to have a photograph taken as required under the act.
- Require notification of at least 21 days before changing a domicile or residence to another country or travels to another country for more than seven days.
- Specify that the reporting requirements would not apply to enrollment in an online or correspondence program at an institution of higher learning.
- If the photograph submitted for the SORA did not resemble the offender in appearance, require the officer or authorized employee of the registering authority to require the individual to obtain a current photograph.
- Increase the original registration fee from \$35 to \$50 and allocate \$30 (instead of \$20) to the MSP for deposit in the Sex Offenders Registration Fund and \$20 (instead of \$10) to be retained by the court, local law enforcement agency, sheriff's department or department post. The fee could be waived for 90 days for an individual who was indigent.
- Require additional information and palm prints to be provided when a person registers. This includes aliases, nicknames, and ethnic or Tribal names; name and address of each employer; name and address of any school attended; all telephone numbers registered or routinely used; all electronic mail addresses, instant message addresses, and login names or other identifiers used by the individual when signing in to those systems; vehicle information, including license plate, registration number, and description of any motor vehicle, aircraft, or vessel owned or regularly operated by the individual, as well as locations where the vehicles or vessels are habitually kept or stored; driver license number; digital copy of passport or immigration documents, and occupational and professional licensing information.

- Require a registration to also include an electronic copy of the offender's driver license or state ID, including the photograph required under the act; the text of the provision of law defining the criminal offense for which the offender is registered; any outstanding arrest warrant information; the individual's tier classification; an identifier indicating whether a DNA sample had been collected and any DNA profile entered into the federal Combined DNA Index System (CODIS); the complete criminal history record; the DOC number and status of parole, probation, or supervised release; and the FBI number.
- If an individual did not register or update registration information when required, require the law enforcement agency responsible for registering the individual to, among other things, determine whether the individual has absconded or is otherwise unlocatable, notify the MSP, revise the information in the registry to reflect that the person has absconded, seek an arrest warrant, and enter the individual into the National Crime Information Center Wanted Person File if appropriate.
- Require MSP, when notified of a failure to register or report, to notify the U.S. Marshall's Service and update the National Sex Offender Registry that the individual absconded or is unlocatable.

Reporting requirements

A resident who is required to be registered under the act must report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located immediately (defined to mean three business days) after any of the following occur:

- Changes or vacates his or her residence or domicile.
- Changes his or her place of employment, or employment is discontinued.
- Enrolls as a student with an institution of higher learning, or enrollment is discontinued.
- Changes his or her name.
- Intends to temporarily reside at any place other than his or her residence for more than seven days.
- Establishes any electronic mail or instant message address, or any other designations used in Internet communications or postings.
- Purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued.

A nonresident required to register under the act who works in Michigan must report in person and notify the registering authority immediately of a change in place of employment or if employment is discontinued.

A sheriff's department must notify the MSP and provide notice of the location of the individual's proposed place of residence or domicile before releasing an individual from a county jail who is required to register. A similar provision for individuals facing release from prison already is in the act.

Law enforcement and public databases

- Require all the revised registration information to be included in the law enforcement database.
- Specify additional information that would have to be included in the public database and specify information that could not be on the public database; for instance, the victim's name or offender's Social Security number.
- Exclude from inclusion on the public database certain registered juvenile offenders, an individual registered solely for being the subject of an order of disposition or other adjudication in a juvenile matter in another state or country, or an individual registered solely because he or she had been convicted of a single Tier I offense.
- Delete a provision under which a person who committed criminal sexual conduct in the first- or third-degree as a juvenile is kept off the public database until he or she turns 18.
- Index the compilation of individuals on the public database alphabetically by village, city, township, and county and geographically as appropriate in addition to zip code.
- If MSP determines that a person completes his or her registration period or is no longer required to register under the act, require MSP to remove the person's registration information from both databases within 7 days of the determination.

Petition to discontinue registration

- Allow an individual to petition, and a court to grant the petition, to discontinue registration under the act if certain criteria have been met, such as completing an approved sex offender treatment program and not being convicted of any felony or listed offense since conviction or release from incarceration. A Tier I offender could petition 10 years or more after conviction or release from prison, whichever was later. Certain Tier III juvenile offenders could petition after 25 or more years from the date of adjudication or release from confinement, whichever occurred last.
- Allow certain juvenile Tier I, II, or III offenders ("Romeo and Juliet" cases) to petition, and a court to grant the petition, with no waiting period.
- Require a court to deny a petition if the petitioner was determined to be a continuing threat to the public and specify criteria for making that determination.
- Allow a presentence hearing for certain Tier II and III juvenile offenders who pled guilty or were found to be guilty to determine if they are eligible for exclusion from the registry. The court's decision would be appealable as a matter of right by either the prosecuting attorney or defendant. Except for what is known as the "rape shield," the rules of evidence would not apply. The victim would have to be given notice of the hearing and could, among other things, submit a written statement to the court.

Penalties

- Delete two misdemeanor offenses and a felony offense pertaining to violations of Section 5a of the act (reporting requirements) and replace them with a

misdemeanor offense punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000, or both.

MCL 28.722 et al. (Senate Bill 188)

MCL 28.726 et al. (Senate Bill 189)

Senate Bill 206

The bill would amend the Code of Criminal Procedure (MCL 777.11b) to revise the sentencing guidelines so as to incorporate the change to the felony penalty for a violation of Section 5a of the act proposed by Senate Bill 189. The bill would delete the current reference to a third or subsequent offense and instead indicate a statutory maximum of two years for failing to update a sex offender registration.

HOUSE COMMITTEE ACTION:

The House Committee adopted a series of amendments to Senate Bill 188 that were primarily technical in nature; the more substantive amendments would do the following:

- Revise the definition of the term "custodial authority" to exclude as an offense requiring registration, incidents involving consensual relationships between a corrections officer or county sheriff's deputy with a person who was under the jurisdiction of the Department of Corrections or a county, respectively, if the officer did not use his or her position of authority to coerce the sexual conduct.
- Allow a presentence hearing for certain Tier II and III juvenile offenders tried as adults to determine if they are eligible for exclusion from the registry. The court's decision would be appealable as a matter of right by either the prosecuting attorney or defendant. Except for what is known as the "rape shield," the rules of evidence would not apply. The victim would have to be given notice of the hearing and could, among other things, submit a written statement to the court.

Amendments to Senate Bill 189 were largely technical in nature.

In addition, amendments were adopted to both Senate Bills 188 and 189 to apply the provisions to "pipeline" cases – meaning cases in which the offense was committed before the bills' effective date but for which the prosecution was still pending or had not yet been commenced by the bills' effective date. However, as worded, the amendments instead apply the bills' provisions only to pipeline cases and to offenses committed after the bills' effective date of July 1, 2011. (It is anticipated that this will be corrected.)

BACKGROUND INFORMATION:

Tier I Offense

A Tier I offense would mean one or more of the following:

- Knowingly possessing child sexually abusive activity or material.
- Indecent exposure with fondling of self, if victim is a minor.

- Unlawful imprisonment (restraining the person), if victim is a minor.
- Criminal sexual conduct (CSC) IV (contact) or assault with intent to commit CSC II (contact) if victim is 18 years or older.
- Surveillance of or distribution of recording, photograph, or visual image of individual with reasonable expectation of privacy if victim is a minor.
- Any other violation of a state law or local ordinance, other than a Tier II or Tier III offense, that by its nature constitutes a sexual offense against a minor.
- An offense committed by a person who was, at the time of the offense, a sexually delinquent person (defined in Section 10a of the penal code as any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations, or by the commission of sexual aggressions against children under the age of 16.
- An attempt or conspiracy to commit an offense described above.
- An offense substantially similar to an offense described above under a law of the U.S., any other state or country, or under Tribal or military law.

Tier II Offender and Tier II Offenses

A Tier II offender would mean either a Tier I offender who is subsequently convicted of another Tier I offense or an individual convicted of a Tier II offense who is not a Tier III offender.

A Tier II offense would mean one or more of the following:

- Accosting, enticing or soliciting a child less than 16 years of age for immoral purpose.
- Persuading, inducing, enticing, coercing, causing, or knowingly allowing a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or distributing or financing the distribution of child sexually abusive material.
- Using the Internet or a computer to commit child sexually abusive activity or CSC offenses.
- Sodomy against a minor unless: (1) the victim consented, the victim was at least 13 years of age but less than 16 at the time of the violation, and the individual was not more than four years older than the victim; or, (2) the victim consented, the victim was 16 or 17 years of age at the time of the violation, and the victim was not under the custodial authority of the individual at the time of the violation.
- Gross indecency between males, females, or males and females if victim was 13 years of age or older but less than 18 unless: (1) the victim consented, the victim was at least 13 years of age but less than 16 at the time of the violation, and the individual was not more than four years older than the victim; or, (2) the victim consented, the victim was 16 or 17 years of age at the time of the violation, and the victim was not under the custodial authority of the individual at the time of the violation.
- Soliciting to commit prostitution if victim is a minor.
- Pandering.

- CSC II, CSC IV, or assault with intent to commit CSC II unless the victim consented, the victim was at least 13 years of age but less than 16 at the time of the violation, and the individual was not more than four years older than the victim.
- CSC II if the victim is 18 years of age or older.
- An attempt or conspiracy to commit any of the above.
- An offense substantially similar to an offense described above under a law of the U.S., any other state or country, or under Tribal or military law.

Tier III Offender and Tier III Offense

A Tier III offender would mean a Tier II offender subsequently convicted of a Tier I or Tier II offense or an individual convicted of a Tier III offense. A Tier III offense would mean one or more of the following:

- Gross indecency with victim less than 13 years of age.
- Kidnapping if victim a minor.
- Taking or enticing child less than 14 years of age with intent to conceal child from parents.
- CSC I, CSC III, or assault with intent to commit CSC with sexual penetration unless the victim consented, the victim was at least 13 years of age but less than 16 at the time of the violation, and the individual was not more than four years older than the victim.
- CSC II or attempt to commit CSC II if victim less than 13 years of age.
- An attempt or conspiracy to commit any of the above.
- An offense substantially similar to an offense described above under a law of the U.S., any other state or country, or under Tribal or military law.

FISCAL INFORMATION:

Senate Bills 188 and 189 would have an indeterminate fiscal impact on state and local government and SB 206 would have no fiscal impact on state and local government.

Senate Bills 188 and 189 are required in order for the state to be in compliance with changes to the Federal Sex Offender Registration and Notification Act (SORNA). If these bills do not become law, the state may lose up to 10% in Federal Byrne Grant funds. These funds are primarily used for multijurisdictional drug enforcement teams made up of troopers and local law enforcement officers. Additionally, the State Police budget contains \$1.8 million in Byrne funds as an interdepartmental grant to the Judiciary for the drug treatment court program.

Under SB 188, the sex offender registration fee would increase from \$35 to \$50, where the State Police would receive an additional \$5 and local law enforcement agencies would receive an additional \$10. The \$5 increase for the State Police would be used for information systems upgrades and program enhancements to be in compliance with the federal laws. The \$10 received by local agencies would likely cover some administrative costs incurred by these agencies.

ARGUMENTS:

For:

Critics of the Michigan Sex Offenders Registry have long maintained that the registry includes so many names of people that do not pose any danger of reoffending or pose any risk of predatory behaviors as to weaken the registry to the point of being useless. Under the SORNA amendments, some offenses that currently require registration will no longer be counted as a listed offense. In addition, many juvenile offenders will no longer have to register as sex offenders and many adults and juveniles who still have to register will no longer be on the public website. Only the most serious crimes, such as forcible rapes, will require lifetime registration and reporting.

To comply with SORNA, more stringent registration and reporting requirements must be adopted. In addition to palm prints, much more information will be collected when a person registers. Some of this information will be posted on the public website. The public website will also enable people to search by city or township rather than just by zip code. Registered offenders will be required to report in person whenever important changes occur, such as buying or selling a car (important since the commission of many sex crimes involve vehicles) or changing employment.

A House committee amendment would resolve an issue addressed in legislation in previous sessions that failed to be enacted. Specifically, the bills would exempt corrections officers and county law enforcement officials from registering as sex offenders when in dating relationships with parolees or probationers when the relationship did not involve the abuse of custodial authority. These amendments address situations such as the sheriff's deputy who ended up on the registry because of having sex with his live-in girlfriend after she was arrested for a misdemeanor offense, and the corrections officer who was placed on the registry after having a consensual affair with a man she had first met when he was incarcerated and then later ran into after he was paroled.

The bills are not perfect and do not address or resolve all inequities in registering or reporting, but they represent a vast improvement over the current registry. The bills remove many persons who pose little risk of reoffending or who are not predators, provide better tracking of registered offenders through increased reporting requirements – all of which should improve the usefulness of the registry and increase public safety.

Against:

When consent is disputed in certain cases, despite a conviction, Senate Bill 188 would require a trial court to conduct a hearing before sentencing to determine whether the defendant meets exemption criteria. However, the bill puts the burden of proof on the defendant to prove the sex or sexual contact was consensual rather than on the prosecutor to prove force or coercion. According to defense attorneys, proving a "negative" (meaning no coercion) is nearly impossible. Instead, the bill should require the prosecutor to prove coercion if he or she believes the facts support such a contention.

The bills still require persons whose convictions were set aside or dismissed to register. This creates a situation where persons lawfully put "no prior convictions" on job applications only to be fired later or needlessly scrutinized when employers realize that they are on the public registry. Other states have exempted from the public registry offenses that have been expunged, set aside, or dismissed and Michigan should follow their example.

The elements of an offense for which juveniles would still have to register, even if adjudicated as a juvenile, would still leave many juveniles on the registry. This is unnecessary as the focus of juvenile court is rehabilitation, and juveniles are very receptive to rehabilitation as evidenced by a recidivism rate for juvenile sex offenders of just 5 percent. The legislation is much harsher than what SORNA requires and should be amended to fit the facts of juvenile sex offenses.

The bills require much more personal information to be included on the public website. Some offenders fear that the bills will therefore increase their risks for identity theft. It is hard enough for these people to obtain housing and employment with good credit; if jobs or housing are lost due to being targeted by information posted on the public registry, it could increase the risk that those individuals would reoffend as housing and employment are proven as playing a major role in reducing recidivism rates.

Response:

Unfortunately, the state is up against a federally-imposed deadline that is fast approaching. In addition, it is not clear at this time what types of variations can be adopted by a state and still be considered to be in "substantial compliance" with SORNA. It is better to enact the legislation in time to continue to receive the full Byrne Grant and then to tackle some of the issues raised by defense attorneys, court personnel, advocates, and those on the registry. Once the framework is approved by federal regulators, it may be easier to determine where the registry can be tweaked to address the concerns raised.

POSITIONS:

The Michigan State Police supports the bills. (3-17-11)

The Michigan Probate Judges Association testified in support of the bills. (3-17-11)

The Prosecuting Attorneys Association of Michigan indicated support for the bills. (3-17-11)

The 17th Judicial Circuit Court-Family Division indicated support for the bill if amendments were adopted to, among other things, not mandate registration for juveniles aged 14–17 for CSC crimes or gross indecency when the victim was younger than 13; eliminate gross indecency from the list of offenses for which juveniles must register; eliminate CSC 2nd and CSC 4th as offenses for which juveniles must register; eliminate the requirement that a juvenile be required to be placed back on the registry following a non-sexual offense adjudication or conviction; and allow Tier III juvenile offenders to petition sooner and more frequently than adults for removal from the registry.

The Michigan Coalition Against Domestic and Sexual Violence indicated a position of neutrality on the bills. (3-17-11)

The Coalition for a Useful Registry testified that it is neutral on the bills. (3-17-11)

The ACLU of Michigan indicated a position of neutrality on the bills. (3-17-11)

The Criminal Defense Attorneys of Michigan indicated opposition to the Senate-passed version of the bill. Amendments adopted in committee did not fully address their concerns. (3-17-11)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.