

SEX OFFENDER REGISTRATION ACT REVISIONS

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House Bill 5679 (H-5) as reported from committee

Sponsor: Rep. James A. Lower

Committee: Judiciary

Complete to 12-1-20

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 5679 would amend the Sex Offenders Registration Act (SORA) to do all of the following:

- Decrease the time period, from *within three business days* to *not more than three days*, for which registrants must register or report status changes in person with a local law enforcement agency.
- Apply the requirement to report all email addresses or internet identifiers (defined in the bill) only to those required to register after July 1, 2011.
- Repeal provisions prohibiting a registrant from living, working, or loitering in a student safety zone.
- Remove successful completion of a term of supervision under the Holmes Youthful Trainee Act (HYTA) from the definition of “conviction,” thereby relieving that youthful trainee from registration requirements. The bill would also specify that “conviction” does not include a conviction that was set aside or otherwise expunged under the adult expungement law.
- Require a registrant to be removed from both the law enforcement database and the public internet website if the registrant presents a court order that the conviction or adjudication requiring registration has been set aside or otherwise expunged.
- Require all telephone numbers and internet identifiers used by the registrant, as well as all information regarding all vehicles operated by the registrant, to be reported, instead of only those routinely used or operated by the registrant.
- Apply the penalty for failure to comply with the requirements of section 5a (e.g., the annual, biannual, or quarterly reporting by tier classification) only if the violation was willful.
- No longer require a registrant’s tier classification to be included on the public website.
- No longer prohibit email addresses or instant message addresses assigned to or used by a registrant, or login names or other identifiers used by the registrant, from inclusion on the public website. (The bill would not specifically require or preclude the inclusion of internet identifiers on the public website).

SORA identifies certain offenses for which registration on the state sex offenders registry is required, establishes the length of time an individual must register as an offender based on a three-tier classification system, requires certain information to be reported and prescribes time requirements for reporting that information and changes to that information, delineates which information can be maintained only in a nonpublic law enforcement database and which information must be posted on a public website, and prescribes penalties for noncompliance with registry requirements. Many current provisions, including tier designations and offenses for which a conviction would mandate registration, would not be affected by HB 5679.

Addition and Revisions to Definitions

The bill would define the term “internet identifier” to mean all designations used for self-identification or routing in internet communications or posting.

The term “immediately,” which is currently defined to mean *within three business days* (i.e., excluding weekends and holidays), would be deleted throughout the act and replaced with specific time frames within which a required action is to be completed. Generally speaking, *immediately* would be replaced for registrants by *not more than three days* (i.e., weekends and holidays would be counted), or, for an action required by a nonregistrant or entity (e.g., the Department of Corrections (DOC) or a probation officer), *immediately* would be replaced by *not more than seven days*. Actions that require a registrant to report to the registering authority (e.g., a local law enforcement agency) include such things as changing a residence, going on vacation for more than a week, starting or ending a job, enrolling and beginning classes at an institution of higher education, and obtaining a new email address or password.

Being assigned to youthful trainee status under the HYTA before October 1, 2004, if the individual is also convicted of any other felony after July 1, 2011, would be no longer be included in the definition of “convicted” for purposes of being required to register under the act. In addition, an assignee who successfully completes a term of supervision under HYTA would not be considered as “convicted” and therefore would not be required to register. (An order of disposition entered under section 18 of the juvenile code or in a juvenile matter in another state or country for certain offenses would still be included in the definition of “convicted.”) The bill would also specify that the term “convicted” does not include a conviction that was subsequently set aside under 1965 PA 213 (the statute providing for set-asides or expungement of adult offenses) or that was otherwise expunged.

The terms “aircraft” and “vessel” would no longer be defined or used in the act.

Registration of individuals and reporting status changes

SORA requires individuals convicted of certain offenses to register and to report changes in their status (e.g., employment, where living, or change in phone number or email) within specific time periods. Currently, all reporting must be done in person. The bill appears to allow the Department of State Police (MSP) to establish another manner in which certain registrants could report certain changes, as described below, but does not require MSP to do so. Further, the bill would decrease, from *within three business days* to *not more than three days*, the time period in which the following individuals would have to register or report in person with the local law enforcement agency, sheriff’s department, or MSP when registering or after a change occurred:

- After becoming domiciled or temporarily residing, working (or after a change in place of employment), or being a student in Michigan if convicted in another state or country:
 - An individual convicted on or after October 1, 1995, of a listed offense as defined before September 1, 1999.
 - An individual convicted of an offense added on September 1, 1999, to the definition of *listed offenses*.
 - Either of the above who is convicted of any other felony on or after July 1, 2011. (Note: This includes felonies that are not listed offenses.)
 - An individual required to be registered as a sex offender regardless of when the conviction was entered.

- A college student (in-state and out-of-state students), after enrolling or discontinuing enrollment in the institution of higher learning.
- A Michigan resident before changing a domicile or residence to another state. (MSP is required under the act to update its databases and promptly notify the appropriate law enforcement agency and applicable sex or child offender registration authority in that new state.)
- For Michigan residents, when doing any of the following (the bill would allow the following to also be reported in a manner other than in person as allowed by the MSP):
 - Changing or vacating a residence or domicile.
 - Changing or discontinuing employment.
 - Changing his or her name.
 - Making a change in enrollment at an institution of higher learning.
- For Michigan residents, to report any of the following to the registering authority having jurisdiction where the registrant's residence or domicile is located and in the manner prescribed by the MSP:
 - Intention to temporarily reside at any place other than his or her residence for more than seven days.
 - Except as otherwise provided in the bill, any change in vehicle information, electronic mail addresses, internet identifiers (all designations used for self-identification or routing in internet communications or posting), or telephone numbers registered to or used by the individual. (This revision would replace the current requirement to immediately report the establishment of any email or instant message address or any other designations used in internet communications or postings and also would replace the requirement to report a purchase or the regular operation of any vehicle and when ownership or operation of the vehicle is discontinued.) However, only those required to register after July 1, 2011, would have to report a change in an email address and internet identifiers.

Certain nonregistrants and entities are also required to register an individual or make certain notifications to other entities within specified time frames. The bill would make the following changes:

- If the individual's probation is transferred to Michigan after October 1, 1995, the probation or parole agent would have up to seven days (increased from *within three business days*) after the transfer to register the individual. This applies to an individual convicted of a listed offense on or before October 1, 1995.
- DOC would have up to seven days (increased from *within three business days*) to notify the local law enforcement or sheriff's department with jurisdiction over the area to which an individual is transferred or to the MSP post of the transferred residence or domicile when the individual is:
 - Transferred to a community residential program.
 - Transferred into a level 1 correctional facility of any kind, including a correctional camp or work camp.
- DOC would have to forward an individual's signed or unsigned notification of his or her duties as a registrant to MSP within seven days (instead of *within three business days*).
- If at the required annual, biannual, or quarterly in-person report the individual's appearance does not sufficiently match the photograph on file, the registering authority would have to require the registrant obtain a current photograph within seven days (increased from *three business days*).

In addition, if a registrant presents an order to the MSP or the appropriate registering authority that the conviction or adjudication for which the individual was required to be registered has been set aside under 1965 PA 213 (which applies only to adult expungements, not to juvenile adjudications) or has been otherwise expunged, his or her registration would have to be discontinued and the department would be required to remove the individual from both the law enforcement database and the public internet website.

Driver license/state ID requirement

Currently, each registrant is required to maintain a valid operator's or chauffeur's license or valid official state identification card with his or her current address. The bill would exempt a registrant who is homeless (who lacks a fixed or temporary address) from this requirement.

The bill would increase the time frame for when an incarcerated registrant must report to the secretary of state for a digitalized photograph to be taken from *immediately* (meaning within three business days) to *not more than seven days* after release.

Registration information

Certain information must be obtained for registration purposes and must be forwarded to MSP to be included in the department's computerized law enforcement database of registrants. The bill would make the following revisions to some of the information that must be provided:

- Instead of requiring the provision of all telephone numbers registered to, or routinely used by, the individual, the bill would require all telephone numbers registered to or used by the individual, including residential, work, and mobile telephone numbers.
- Instead of requiring the provision of all email addresses and instant message addresses assigned to, or routinely used by, the individual and all login names or other identifiers when using email or instant messaging systems, the bill would require all email addresses and internet identifiers registered to or used by the individual. This requirement would apply only to an individual required to be registered after July 1, 2011.
- The bill would require the license plate number and description of any vehicle owned or operated by the individual, not just those regularly operated. The registration number and the location where the vehicle is habitually stored or kept, and information regarding a vessel or aircraft, would no longer have to be provided.

Public registry

Most, but not all, of the information contained in the nonpublic law enforcement database of registrants is also available to the public on an internet website. The bill would require the license plate number and description of any vehicle owned or operated by the individual, not just those regularly operated as is the current requirement, to be included on the public website. The registration number and the location where the vehicle is habitually stored or kept, and information regarding a vessel or aircraft, would no longer be required to be provided.

A registrant's tier classification would no longer have to be posted on the public registry, and the bill would specifically list a tier classification as information that could not be included in the public internet website.

In addition, the act currently prohibits any electronic mail addresses and instant message addresses assigned to or routinely used by the registrant to be included on the public website. The bill would delete the prohibition, but does not specifically add them to the list of what must be included on the public website.

Further, if a registrant provides MSP with documentation that a conviction requiring him or her to register has been set aside or expunged, the act now requires the department to indicate on the public website that the offense requiring that person to register has been expunged or set aside. The bill would delete this provision.

Penalty

Currently, failure to comply with the requirements of section 5a is a misdemeanor punishable by imprisonment for up to two years or a fine of up to \$2,000, or both. The bill would apply the penalty only if the noncompliance was *willful*. (Among other things, section 5a requires a registrant to report to the registering authority each year based on tier classification and to maintain a state driver license or state personal ID.)

Repealers

The bill would repeal sections 33 to 36 of the act, which pertain to student safety zones.

Section 33 defines terms including “loiter,” “school,” and “school property.”

Section 34 prohibits a registrant from working or loitering within a student safety zone, provides exceptions, and prescribes penalties for a violation.

Section 35 prohibits, with some exceptions, a registrant from living within a student safety zone and provides penalties for a violation.

Section 36 provides exemptions from the prohibitions of sections 34 and 35 for individuals convicted of certain offenses as juveniles or who were discharged from youthful trainee status.

MCL 28.722 et al.

BACKGROUND INFORMATION:

Listed offense

As defined in SORA, “listed offense” means a Tier I, II, or III offense. A conviction for a Tier I offense requires registration under the SORA for 15 years, Tier II requires registration for 25 years, and Tier III requires lifetime registration.

Tier I offenses include possession of child pornography, indecent exposure while fondling genitalia (if the victim is a minor), unlawful imprisonment (if the victim is a minor), prostitution with a minor, criminal sexual conduct in the fourth degree (if the victim is an adult), certain crimes associated with surveilling another when the person has the expectation of privacy (if the victim is a minor), and any other violations of law that constitute a sexual offense (if the victim is a minor).

Tier II offenses include accosting, enticing, or soliciting a child for immoral purpose; producing or distributing child pornography; committing or attempting to commit, or soliciting another to commit, various sexual offenses in which the victim or intended victim is or is believed to be a minor; with some exceptions based on age of victim and perpetrator, sodomy or gross indecency (if the victim is a minor); human trafficking of a minor for the commercial sex trade; accosting or soliciting a minor to commit prostitution; inducing another to become a prostitute; second or fourth degree criminal sexual conduct (if the victim is 13 to 18 years of age); second degree criminal sexual conduct (if the victim is at least 18 years of age); or attempting or conspiring to commit any of the above.

Tier III offenses include gross indecency (if the victim is 12 years of age or younger); kidnapping (if the victim is a minor); taking or enticing away a child under 14 years of age; first and third degree criminal sexual conduct (with some exceptions for consensual acts based on the age of the victim and the perpetrator); second degree criminal sexual conduct (if the victim is 12 years of age or younger); fourth degree criminal sexual conduct (if the victim is 12 years of age or younger and the perpetrator is at least 17 years of age); or attempting or conspiring to commit any of the above.

Related court cases and orders

Michigan's sex offender registry was created by 1994 PA 295. The registry has been amended numerous times since, most notably in 2006 (addition of geographic exclusion zones restricting where registrants could live, work, or visit) and 2011 (establishment of tier classification system, increased registration periods).

In 2015, in what is referred to as *Does I*, a federal district court held that certain provisions of SORA were unconstitutional and therefore unenforceable (e.g., the exclusion zones). The state appealed, and in 2016 the federal Sixth Circuit Court ruled that the 2006 and 2011 amendments were punishment and could not be applied retroactively, meaning that the amendments made to SORA by that legislation only applied to those who were placed on the registry after the statutory changes took effect.¹ An appeal by the state to the U.S. Supreme Court was denied.

Does II, a class action civil suit brought on behalf of all current registrants and individuals who will be required to register to ensure that the *Does I* decision is applied to all registrants, was subsequently filed.²

On May 23, 2019, a federal district court for the Eastern District issued an order setting a 90-day deadline (August 21, 2019) for the registry law to be revised in line with the previous court decisions. Under the declaratory judgment, the court could enter an injunction that would bar (or prohibit) enforcement of parts or all of SORA against many of the current registrants until the legislature revises or replaces the act to address the issues raised by the court.

Further, on April 6, 2020, an interim order was issued by Judge Cleland of the federal district court of the Eastern District.³ The order stops law enforcement from enforcing registration, verification, and school zone and fee violations connected with Michigan's sex offender registry law from February 14, 2020, through the end of the COVID-19 crisis. The order does not prohibit maintenance of, or voluntary compliance with, the registry.⁴

BRIEF DISCUSSION:

According to supporters, House Bill 5679, in its present form, addresses many of the issues raised by the courts and by opponents of sex offender registries. In particular, it would repeal sections of the Michigan registry that create geographic exclusion zones, which prohibit registrants from living, working, or loitering near schools and which were declared unconstitutional by a federal court. It would align the registry with the federal Sex Offender Registration and Notification Act (SORNA) and would remove from the registry those who

¹ #1-5 *Does v Snyder*, 834 F3rd 696 (6th Cir 2016)

² *Does # 1-6 v Snyder*, No. 16-cv-13137 E.D. Mich.

³ https://www.michigan.gov/documents/msp/SORA_Does_II-4-6-2020_Interim_Order_and_Preliminary_Injunction_686125_7.pdf

⁴ See <https://www.michigan.gov/msp/0,4643,7-123--524592--,00.html>

have never been convicted of a listed offense, who had convictions expunged, or who completed trainee status under the Holmes Youthful Trainee Act. A registrant's tier classification would no longer be included in the information on the public website. The bill also relieves those requiring registration before July 2011 from having to report changes in email addresses or passwords.

Critics say that, despite the removal of exclusion zones, the bill still falls short in addressing issues raised by the court. For instance, the bill retains the tier classifications for all registrants, despite the conclusion of the Sixth Circuit that application of the tiers to pre-2011 registrants (when the tiers were added) is an unconstitutional violation of the Ex Post Facto Clause. Without addressing all of the concerns raised by the courts, the bill would invite further litigation and maintain a registry that is cumbersome, punitive in nature, and difficult for registrants to comply with and for law enforcement to enforce. Some of the concerns raised by the attorney general and other opponents of the bill include:

- The bill retains the offense of conviction as the only factor in determining whether a person is to register as a sex offender and for how long a person would remain on the registry instead of basing registration on a person's individual risk assessment of reoffending.
- By shortening the reporting periods to just three days (which would include weekends and holidays), the bill would make the in-person reporting requirements even more burdensome than current requirements, therefore increasing the likelihood that portions, if not all, of the bill would be found to be unconstitutional.
- Very few adult sex offenses can be expunged under current law (so few registrants could have an offense set aside or expunged and therefore removed from the registry), and the bill lacks any path for a person who has remained crime-free for years to petition for removal from the registry, other than the current provision for a Tier I offender to petition for removal after 10 years on the registry and for a juvenile offender to petition for removal from lifetime registration after 25 years (if adjudicated as a juvenile) or from what is referred to as a "Romeo and Juliet" offense in which sex was consensual between teenagers of certain ages.
- According to juvenile justice experts, the bill would still exceed federal requirements under SORNA in relation to juveniles. Juveniles have low rates of recidivism and respond well to treatment, and research reveals great harm over a lifetime when juveniles are placed on a registry. Advocates recommend that juveniles not be placed on sex offender registries.
- The bill retains the public registry website despite a large body of evidence that sex offenders have a low overall recidivism rate unrelated to registry laws, that burdensome reporting requirements and related social stigma increase recidivism, and that no increased safety to the public by registries has been proven. Evidence instead shows that public registries make it harder for a registrant to reintegrate successfully into the community and obtain housing and employment—factors known to decrease recidivism. Further, many registrants report discriminatory and abusive acts due to placement on a public registry directed not just at them, but also at family members, including their young children. Reserving placement on a public registry for repeat offenders or for those assessed as having a higher risk of reoffending would spare many who have turned their lives around from a lifetime of harassment and discrimination.

FISCAL IMPACT:

House Bill 5679 could result in cost increases for MSP and other law enforcement agencies. The magnitude of these costs would depend on the amount of changes necessary to implement the provisions of the bill and is presently indeterminate.

POSITIONS:

A representative of the Michigan Coalition to End Domestic and Sexual Violence testified in support of the bill. (5-6-20)

The Prosecuting Attorneys Association of Michigan indicated support for the bill. (5-6-20)

Representatives of the following entities testified or submitted written testimony in opposition to the bill:

- ACLU of Michigan (5-13-20, and indicated opposition to the H-2 substitute 12-1-20)
- State Appellate Defender Office (5-6-20, and indicated opposition to the H-2 substitute 12-1-20)
- Criminal Defense Attorneys of Michigan (5-6-20, and indicated opposition to the H-2 substitute 12-1-20)
- Michigan Citizens for Justice (5-6-20, and indicated opposition to the H-2 substitute 12-1-20)
- Safe and Just Michigan (5-13-20, and indicated opposition to the H-2 substitute 12-1-20)
- Association for the Treatment of Sexual Abusers (5-19-20)
- University of Michigan Law School (5-27-20)
- American Friends Service Committee's Michigan Criminal Justice Program (5-19-20)
- Legal Reform for Intellectually and Developmentally Disabled (12-1-20)
- Freedman & Herskovic, PLC (5-5-20)
- Illumine Research, Analysis, and Consulting LLC (5-12-20, and indicated a neutral position on the H-2 substitute 12-1-20)
- Coalition for a Useful Registry (5-13-20)

Representatives of the following entities indicated opposition to the bill (12-1-20):

- Michigan Collaborative to End Mass Incarceration
- Washtenaw Citizens for Restorative Justice
- MI-CURE

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Marcus Coffin

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