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Sent via E-mail and U.S. mail

Attorney General Javier Becerra
California Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

Re: Error in Form CJIS 8102S, Revision Date 01/2020, entitled
“Sex Offender Registration – Change of Address / Annual or Other Update”

Dear Attorney General Becerra:

The purpose of this letter is to bring to your attention a significant error in the form currently used by the California Department of Justice (DOJ) to notify individuals required to register as sex offenders pursuant to Penal Code Section 290 (registrants) of their obligations under state and federal law. Specifically, the January 2020 revision of Form CJIS 8102S added the following statement to the section entitled “Registration Obligations” on page 3, item no. 11, second sentence:

Federal law requires me to notify my registering agency no less than 21 days before I intend to travel internationally.

This statement, which includes no citation to federal law, is inconsistent with federal law on the subject of international travel notification. The Alliance for Constitutional Sex Offense Laws (ACSOL) therefore respectfully requests that the California DOJ eliminate this statement from Form CJIS 8102S until the obligation to report intended international travel is required by the U.S. Attorney General. ACSOL further requests that the California DOJ acknowledge that such future notice, if any, must include additional detail, discussed below, in order to be consistent with federal law.

I. The federal statutes governing international travel contain no 21-day notice obligation, and are not yet enforceable against registrants

Two federal statutes governing international travel reporting obligations by registrants:

- (1) the federal Sex Offender Registration and Notification Act (SORNA), codified at 34 U.S.C. 20914 (“Section 20914”); and
- (2) SORNA’s enforcement provision, 18 U.S.C. § 2250 (“Section 2250”).

Critically, although Section 20914 does impose an international travel notification obligation upon individual registrants, the nature of that obligation is undefined and, pursuant to the plain terms of Section 20914, that obligation does not apply to registrants until specifically required by the U.S. Attorney General. As relevant to the international travel reporting obligation, Section 20914 provides as follows:

§ 20914. Information required in registration

(a) Provided by the offender. The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

....

(7) Information relating to intended travel of the sex offender outside the United States, including any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.

....

(c) Time and manner. A sex offender shall provide and update information required under subsection (a), including information relating to intended travel outside the United States required under paragraph (7) of that subsection, in conformity with any time and manner requirements prescribed by the Attorney General.

(34 U.S.C. § 20914, emphasis added.) Accordingly, at this time there is no federal statutory obligation for registrants to report intended international travel at least 21-days ahead of departure, as Form CJIS 8102S currently states. That is because a registrant's federal obligation to report intended international travel does not exist until the U.S. Attorney General prescribes the "time and manner requirements" for complying with that obligation. Those "time and manner" requirements, once issued, may or may not include a 21-day deadline. In summary, as of the date of this letter, the U.S. Attorney General has not, by regulation or otherwise, prescribed a requirement that registrants provide information regarding international travel within 21 days of an intent to travel.

Instead, the U.S. Department of Justice has issued regulations applicable to state governments which contain, as a condition of SORNA compliance, a requirement that state governments enact state laws which obligate registrants to report intended international travel within 21 days. (See 76 F.R. 1637, Jan. 11, 2011 ["The authority under 42 U.S.C. 16914(a)(7) to expand the range of required registration information is accordingly exercised to provide that registrants must be

required to inform their residence jurisdictions of intended travel outside of the United States at least 21 days in advance of such travel.”].) However, these federal regulations are not directly applicable to registrants, and for that reason registrants cannot be held liable under SORNA or any other federal law for failing to provide at least 21-days’ notice of intended international travel. (See *U.S. v. Belaire* (5th Cir. 2012) 480 Fed. Appx. 284, 287-88 (5th Cir. 2012); *U.S. v. Ward* (N.D. Fla. Nov. 14, 2014) 2014 U.S. Dist. LEXIS 160392, *20-*21.) Notably, the state of California has not followed federal guidance on this issue and there is no state law, in fact, that requires registrants to report intended international travel.

Accordingly, the statement “Federal law requires me to notify my registering agency no less than 21 days before I intend to travel internationally” in Form CJIS 8102S is false because “federal law” does not currently contain that obligation. The Department’s decision to include this erroneous statement in the 01/2020 revision of Form CJIS 8102S is therefore an ultra vires act, not sanctioned by either state or federal law. In addition, that statement falsely suggests that registrants are liable under SORNA unless they provide such information at least 21 days before intended international travel.

II. Any notice to registrants regarding a future obligation to provide international travel notifications will require significant qualification

If and only if the U.S. Department of Justice adds to SORNA the “time and manner” requirements for reporting intended international travel, the California DOJ must provide legally sufficient notice of this obligation to registrants in California. That requirement would, of course, be required to include more detail than the current version of Form CJIS 8102S appears to specify. There are several reasons for this.

Most notably, SORNA and Section 20914 require registrants to report “Information relating to intended travel of the sex offender outside the United States, including any anticipated dates and places of departure, arrival, or return” (34 U.S.C. 29014(a)(7), emphasis added.) Thus, a federal obligation to report international travel does not arise until the registrant forms an “intent” to travel. Obviously, a registrant who does not form an intent to travel internationally more than 21 days prior to the intended departure date cannot comply with a 21-day notice deadline, nor could that registrant violate SORNA by failing to comply with that deadline. The 2011 supplemental SORNA guidelines issued by the U.S. Department of Justice anticipated this reality, and advised individual states to consider it when enacting any international travel reporting requirements at the state level, as follows:

While notice of international travel will generally be required as described above, it is recognized that requiring 21 days advance notice may occasionally be unnecessary or inappropriate. For example, a sex offender may need to travel abroad unexpectedly because of a family or work emergency. Or separate advance notice of intended

international trips may be unworkable and pointlessly burdensome for a sex offender who lives in a northern border state and commutes to Canada for work on a daily basis. Jurisdictions that wish to accommodate such situations should include information about their policies or practices in this area in their submissions to the SMART Office and the SMART Office will determine whether they adequately serve SORNA's international tracking objectives.

(See 76 F.R. 1638, Jan. 11, 2011.) Accordingly, because federal law requires only the reporting of "intended" international travel, any notice provided to registrants of this obligation must take account of registrants whose intent to travel internationally is formed after the deadline articulated by the U.S. Attorney General has passed. The current version of Form 8102S does not account for this, and therefore that form inaccurately describes federal law.

Relatedly, the architecture of SORNA in general, and of Section 20914's information reporting requirements in particular, are entirely dependent upon state and local government facilitating and accepting the reporting of that information by individual registrants. SORNA's enforcement provision, Section 2250, anticipates situations in which a registrant's compliance with Section 20914 is prevented by "uncontrollable circumstances" that render compliance impossible or impracticable. Section 2250 provides:

§ 2250. Failure to register

....

(c) Affirmative defense. In a prosecution for a violation under subsection (a) or (b) [*i.e.*, international travel reporting], it is an affirmative defense that—

- (1) uncontrollable circumstances prevented the individual from complying;
- (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and
- (3) the individual complied as soon as such circumstances ceased to exist.

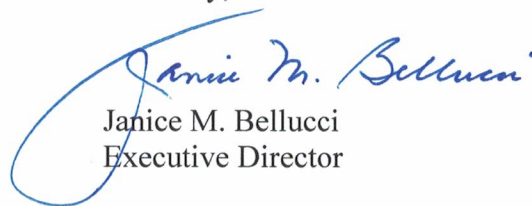
(18 U.S.C. § 2250(c).) Logically, such "uncontrollable circumstances" include the inability or unwillingness of a state or local law enforcement agency to accept information from a registrant that the registrant attempts to submit regarding intended international travel. Accurate notice of a registrant's duty to report international travel to a state or local law enforcement agency must therefore advise registrants of how such reporting is to be accomplished, as well as the limitation on liability for "unforeseen circumstances" that prevent such reporting. Notably, the current version of Form CJIS 8102S contains no detail on how or where a registrant in California is required to report intended international travel, as well as accommodation for "unforeseen circumstances." Such an omission from a future version of Form CJIS 8102S would fail to

adequately inform registrants of the nature of their duty under federal law, and would also stymie registrants' attempts to comply, thereby frustrating the purposes of both SORNA and the Form itself.

III. Conclusion

As currently written, Page 3, item no. 11, of Form CJIS 8102S misstates federal law by stating there is a 21-day deadline for reporting intended international travel that does not in fact exist. ACSOL therefore respectfully requests that California DOJ immediately remove the second sentence of item no. 11 from Form CJIS 8102S until the U.S. Attorney General promulgates the "time and manner" requirements on which the obligation to report intended international travel are conditioned. If that should occur, any notice provided to registrants in a revised Form CJIS 8102S must accurately reflect the nature of that obligation. ACSOL would be pleased to work with the Department to craft a legally sufficient notice that is understandable to registrants, once the U.S. Attorney General has issued time and manner requirements.

Sincerely,



Janice M. Bellucci
Executive Director