



## Tiering

Once a determination is made that a prior conviction is a sex offense under SORNA, the practitioner must then decide the SORNA tier in which the offense should be classified. The tier of the offense will govern two important issues in a § 2250 prosecution: (1) the duration of time a sex offender is required to register; and (2) the base level for the sentencing guidelines.<sup>1</sup>

SORNA defines its three tiers in 34 U.S.C. § 20911:

(2) The term “**tier I** sex offender” means a sex offender other than a tier II or tier III sex offender.

(3) The term “**tier II** sex offender” means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

- (i) sex trafficking (as described in section 18 U.S.C. § 1591);
- (ii) coercion and enticement (as described in section 18 U.S.C. § 2422(b));
- (iii) transportation with intent to engage in criminal sexual activity (as described in 18 U.S.C. § 2423(a));
- (iv) abusive sexual contact (as described in 18 U.S.C. § 2244);

(B) involves—

- (i) use of a minor in a sexual performance;
- (ii) solicitation of a minor to practice prostitution; or
- (iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) The term “**tier III** sex offender” means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in 18 U.S.C. §§ 2241 and 2242);<sup>2</sup> or

(ii) abusive sexual contact (as described in 18 U.S.C. § 2244) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

If an underlying federal conviction is specifically listed in one of the tier definitions above (*e.g.*, 18

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<sup>1</sup> More information about how the SORNA tier of the underlying offense impacts sentencing guideline determinations in 18 U.S.C. § 2250 prosecutions can be found at § 2A3.5 of the United States Sentencing Commission Guidelines, [https://www.ussc.gov/sites/default/files/pdf/training/primers/2024\\_Primer\\_Sex\\_Offense\\_Register.pdf](https://www.ussc.gov/sites/default/files/pdf/training/primers/2024_Primer_Sex_Offense_Register.pdf).

U.S.C. § 2241), it is tiered as designated in the statute. However, if a prior conviction is not specifically listed (which will be the case for *all* military, state, tribal, territory, and foreign offenses), it might be analyzed via either the Categorical or Circumstance-Specific approach, depending on the § 20911 tiering subsection being utilized.

When evaluating an offense as “comparable or more severe than” a certain federal offense, a categorical or modified categorical approach is more likely to be utilized.

For offenses “involving” certain conduct, a circumstance-specific approach is often possible.

Practitioners should consult Circuit precedent and the most recent guidance from CEOS in adopting their litigation strategy in such cases; there have been some particularly adverse Circuit-level cases in recent years regarding tiering determinations.<sup>3</sup>

### **VAWA 2022 & Potential Tiering Changes**

On March 15, 2022, the reauthorization of the Violence Against Women Act (VAWA) passed as part of the Omnibus spending bill (Pub. L. 117-103) and amended a few substantive federal sex offenses cross referenced in SORNA’s tiering provisions. The relevant amended statutes now provide as follows:

**18 U.S.C. § 2242 (Sexual Abuse)** has a new subparagraph (3) providing that it is a violation of § 2242 when a person “engages in a sexual act with another person without that other person's consent, to include doing so through coercion.”

Because § 2242 is specifically listed as a Tier III offense in SORNA (34 U.S.C. § 20911(4)(A)(i)), there is no listed victim age requirement, and the statute now expands to any offense committed “without consent”, this could change how the courts have been tiering sexual penetration offenses. It appears that any felony sexual penetration offense, regardless of the age of the victim—so long as it is charged as a nonconsensual offense—would be a tier III offense. Courts have often split hairs over the amount of force required in their tiering decisions, and this amendment should help us in those kinds of cases.

**18 U.S.C. § 2244 (Abusive Sexual Contact)** contains a cross reference to the amended § 2242; it appears this change makes any felony nonconsensual sexual contact with a minor by definition a tier II offense, and if the child was under 13, a tier III offense.

### **Duration of Registration Requirement**

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<sup>3</sup> See, e.g., *U.S. v. Walker*, 931 F.3d 576 (7<sup>th</sup> Cir. 2019) (children under 15 are not categorically incapable of appraising the nature of sexual conduct, as required in 18 U.S.C. § 2242(2)(a), so tier I offense); *United States v. Barcus*, 892 F.3d 228 (6<sup>th</sup> Cir. 2018) (because state statute does not require ‘intent’ to be proven, it ‘sweeps more broadly’ than the federal offense and is not a tier III); *United States v. Escalante*, 933 F.3d 395 (5<sup>th</sup> Cir. 2019) (35-year-old had sexual contact with a 14-year-old, but court could not look at the circumstances to determine if the appropriate age differential existed, so it is a tier I offense); *United States v. Morales*, 801 F.3d 1 (1<sup>st</sup> Cir. 2015) (because state statute had a cutoff age of 13 it ‘swept more broadly’ than the federal offense—with a cutoff age of 12—and is not a tier III offense); *U.S. v. White*, 782 F.3d 1118 (10<sup>th</sup> Cir. 2015) (state offense did not require physical contact as an element, so not a tier II or tier III offense); *U.S. v. Cabrera-Gutierrez*, 756 F.3d 1125 (9<sup>th</sup> Cir. 2014) (offender had sex with an intoxicated 15-year-old but because no age specified in state statute and broader non-consent element, not a tier III offense); *United States v. Montgomery*, 966 F.3d 335 (5<sup>th</sup> Cir. 2010) (because state offense did not require any force beyond that necessary to commit the offense, it is a tier I).

The tier of the offender's underlying sex offense will determine the duration of their registration responsibilities under SORNA. SORNA requires registration for the following periods of time, depending on how the offender's underlying conviction is classified:

Tier I: 15 years  
Tier II: 25 years  
Tier III: Lifetime

The duration of a sex offender's registration requirement will be measured from the time of their sentencing or release from incarceration, whichever is later. A sex offender's registration duration is not tolled during periods of subsequent incarceration.<sup>4</sup> In other words, once the SORNA clock starts for an offender, it does not stop, even if they go back to jail for a period of time. If a sex offender's SORNA registration requirement has expired, that offender cannot be successfully prosecuted under 18 U.S.C. § 2250.

#### **For Additional Assistance**

USMS personnel are encouraged to contact:

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<sup>4</sup> SORNA Rule, p. 57 ("...the running of the SORNA registration period is [not] suspended during...subsequent confinement").