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COMMENTS ON PAROLE BOARD PROPOSED REPEAL OF SEX OFFENDER COMMUNITY NOTIFICATION GUIDELINES
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The ACLU of Rhode Island, the R.I. Coalition for the Homeless, the RI Homeless Advocacy Project, House of Hope CDC, and the National Association of Social Workers – RI Chapter object to the Parole Board's proposed repeal of its current "Sex Offender Community Notification Guidelines" and its plan to instead consider the document as constituting internal "guidelines" not subject to Administrative Procedures Act (APA) rule-making.

The APA defines a rule as "the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency and has the force of law." R.I.G.L. §42-35-1(19). We believe that these Parole Board standards, however they are termed, clearly meet this definition and are therefore subject to the rule-making provisions of the APA.

In fact, the statute mandating the adoption of these standards specifically refers to them as "rules and regulations." R.I.G.L. §11-37.1-12. Even though they are also referred to as "guidelines and procedures," the statutory definition of "rule" as cited above specifically includes statements implementing or prescribing "procedures." That the statute also uses the term "guidelines" is a woefully insufficient argument for removing these rules from the APA process.

Just as telling, the statute specifically refers to the "*promulgation*" of these "guidelines and procedures," a term that is associated with formal rule-making. Black's Law Dictionary defines "promulgate," specifically in the context of an administrative agency like the Parole Board, as

meaning "to carry out the formal process of rulemaking by publishing the proposed regulation, inviting public comments, and approving or rejecting the proposal," precisely the process for APA rule-making.

By any fair reading, these standards are more than internal guidelines, as they implement clearly enforceable standards that directly affect both sex offenders in the community and members of the public. Indeed, a major goal of both the statute and the rule is to adopt standards for notifying the public.

These standards, it must be emphasized, are not a mere reiteration of the Sexual Offender Registration and Community Notification Act's statutory language. Instead, they contain mandatory notification provisions that both interpret and expand upon that language in meaningful ways that directly impact the rights and responsibilities of the public. Some of the organizations signing on to this testimony have testified before the Parole Board in the past to point this out and to urge revisions to the document since, in implementing the Act, its mandatory notification provisions go beyond the Act's dictates in some instances. In that regard, we have enclosed testimony submitted by the ACLU of Rhode Island to the Parole Board in 2015 that makes that point. In light of their effect and reach, there can thus be no plausible claim that the regulations are merely internal in nature and exempted from the statutory definition of a rule on that basis.

The Public Notice of Proposed Rulemaking states that this document was "erroneously codified as regulations" in 2016, that the Parole Board's previous long-standing practice was to treat the document as internal guidelines, and that this rule repeal is therefore only correcting an error. For the reasons expressed above, however, we believe the error resided in *not* having treated this document for so many years as a regulation subject to the APA.

For all these reasons, we believe that repeal of this regulation is unwarranted and contrary to the APA. Our organizations therefore object to its direct final repeal, and instead urge its repromulgation as a regulation in accordance with Administrative Procedures Act procedures.

We appreciate your attention to our views, and trust that you will give them your careful consideration. If the suggestions we have made are not adopted, we request that, pursuant to R.I.G.L. §42-35-2.6, you provide us with a statement of the reasons for not accepting these arguments.

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Enclosure

ATTACHMENT

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COMMENTS ON 2015 SEXUAL OFFENDER COMMUNITY NOTIFICATION GUIDELINES
December 3, 2015

The ACLU of Rhode Island appreciates the opportunity to comment on the proposed Sexual Offender Community Notification Guidelines for 2015. Although this version of the Guidelines has been in effect for a number of years, we continue to believe that, in a few significant instances, they exceed the authority statutorily granted to the Sex Offender Community Notification Unit. We urge revisions to address these concerns.

Before addressing issues surrounding the Guidelines' compatibility with the SORNA statute itself, we wish to emphasize that there are important policy reasons why SOCNU should be wary of over-reliance on broad notification requirements. By overpublicizing the presence of sex offenders in the community, the largely foreseeable effect is to make it harder, not easier, to reintegrate offenders into the community, encourage their rehabilitation, and keep them productively employed and housed. As SOCNU is well aware, the overwhelming majority of sex offenses are committed against family members, relatives and close acquaintances of the offender, not strangers. Broad-based notification requirements are thus not only ineffective, but promote a false sense of security among local residents. While SOCNU must take steps to comply with existing statutory obligations concerning notification, we believe it is a policy mistake to go beyond what the law requires, as its impact is largely the opposite of what is helpful for either the community or the offender. The current Guidelines present a clear example of this.

With that said, we proceed to explaining various ways that these Guidelines unnecessarily and improperly extend the reach of the SORNA statute.

The statute limits notification for the three levels of offenders as follows:

(1) If risk of re-offense is low, ***law enforcement agencies*** *and any individuals identified in accordance with the parole board Guidelines shall be notified.*

(2) If risk of re-offense is moderate, ***organizations in the community*** *likely to encounter the person registered shall be notified in accordance with the parole board's Guidelines, in addition to the notice required by subdivision (1) of this subsection.*

(3) *If risk of re-offense is high, the* ***members of the public likely to encounter the person*** *registered shall be notified through means in accordance with the parole board's Guidelines designed to reach members of the public likely to encounter the person registered, in addition to the notice required by subdivisions (1) and* (2) of this subsection. (R.I.G.L. §11-37.1-12)

Various provisions of the Guidelines go well beyond those standards. For the reasons expressed below, we therefore recommend revisions of certain sections in order to address these discrepancies.

1. Delete sections 7.2.2 – 7.2.6 (pages 17 – 18); section 7.3.4 (page 18); sections 7.4.1 – 7.4.5 (pages 18-19); and section 7.5.2 (page 20).

These proposed deletions would discontinue the procedure of having schools and day care facilities supply police with the names of parents, who are then directly notified by police about the presence of Level 2 offenders in the community. The statute does not authorize direct notification of individuals for Level 2 offenders.

In effect, these various provisions shift notification Levels 2 and 3 upward, so "members of the public," not just organizations, are included in Level 2, and (as noted later) Level 3 corresponds to notification of the entire general public, not just those members of the public who are "likely to encounter the person." This undermines the point of having the three statutorily defined tiers for notification purposes.

Section 7 of the current Guidelines states that all schools and day care establishments must be notified of a Level 2 offender. However, the notification process doesn't stop there: administrators are then responsible for submitting a parent directory to law enforcement agencies, who use it to send offender fact sheets directly to all parents except those who self-exempt from the directory. In effect, law enforcement officials are contacting individual parents, in apparent violation of the statute's intent that only *organizations* are to be notified about Level 2 offenders.

This procedure thus also departs from section 7.6 of the Guidelines, dealing with Level 2 notification of non-school "Organizations and Establishments" such as sports leagues and youth groups. There (with one notable exception explained later), notification is limited to adult organizational volunteers, employees, and security, without activating the level of alert reserved specifically for Level 3 by SORNA. In fact, section 7.6.3 specifically includes language regarding the confidentiality of information and a reminder of "the limits on allowable distribution."

Our suggested deletions to Section 7 would make the process for schools and day care facilities consistent with 7.6 – and the statute – by limiting Level 2 notifications to administrators who are authorized to share the information only with employees.

We note that the statute allows posting of Level 2 and Level 3 offenders on the Internet (R.I.G.L. §11-37.1-12(b)(4)). Given that the information is thus easily available for parents who seek it, this further highlights the inappropriateness under the statute of providing for *direct* distribution of notification to parents that the current policy entails. There is a significant distinction between the passive notification provided by Internet postings, authorized by the statute, and the direct communication specified in these Guidelines for Level 2 offenders, which is contrary to the statutory tier language.

This concern is also consistent with §11-37.1-11, which calls for the disclosure of Level 2 and Level 3 offenders to the general public in a city or town by local police departments. R.I.G.L. §11-37.1-11 is not the notification statute; rather, it governs the release of information.

Thus, it should be assumed that §11-37.1-11 only authorizes information about Level 2 and Level 3 offenders to be released for the purposes of inclusion on the websites listed in §11-37.1-12(b)(4).

2. Delete from section 7.6.2 the sentence: "Neighborhood Crime Watch groups in neighborhoods where the offender is likely to be encountered." (page 21).

Section 7.6.2 is designed to comply with the statute in limiting the distribution of Level 2 offender information to "organizations in the community likely to encounter the person." While we might question some of the organizations on that list in terms of being "likely to encounter the person," there can be no question that one of the "organizations" listed goes far beyond what the statute envisions. A "neighborhood crime watch" group is not an organization; it is merely a collection of individuals who are no more likely to "encounter" a Level 2 offender than any other member of the community. This sentence should therefore be deleted.

3. Amend section 9.5 (page 23), dealing with Level 3 offender notification.

In the case of Level 3 offenders, the Guidelines authorize law enforcement agencies to decide which *individual* community members should be notified, based on the offender's "prior history, age, offense characteristics, employment, recreational, social, and religious interests and the characteristics of likely victims." (Section 9.3) However, the means of notification in 9.5 are not specific to individual intended recipients. They include news releases (9.5.2); fliers (9.5.3); advertisements in local newspapers (9.5.4); and any other available methods of distribution (9.5.6).

Under these Guidelines, then, *every* community member can be made aware of a Level 3 offender's identity, as would many non-community members. This appears to violate the statute, which limits notification to "members of the public who are likely to encounter the person registered." (R.I.G.L. §11-37.1-12(b)(3)). (Again, we emphasize the distinction between passive Internet notification, which SORNA allows, and more active types of notification specified in this section.)

The methods of notification at Level 3 should therefore be revised for better audience specificity, such as providing mail notice to pre-identified households. To further guard against over-reach, we would urge that any notices specify only that the recipient has been included in a notification plan, and that he or she should contact the police if more details about the offender's identity are wanted.

4. **Amend Section 12.3 (page 25) as recommended below.**

Section 12.3 would appear to require community re-notification if an offender's risk level is ever changed, even if it is lowered. However, re-notification can only amount to more publicity for the offender, which is unwarranted if the offender has in fact shown improvement and may not want further attention brought to his or her status. In such cases, the offender should be permitted to decide whether he or she wants his new level to be announced, and to whom the announcement will be made.

We therefore suggest adding a new subsection to address this concern:

"12.3.1: If an offender is reclassified at a lower risk level, he or she will be given the option to decide if the community will be notified of the reduced risk, and what means and channels of notification will be used. Any notice will specify that the offender's Risk Level has been reduced from a prior level."

If the suggestions we have made are not adopted, we request that, pursuant to R.I.G.L. §42-35-3(a)(2), you provide us with a statement of the principal reasons for and against adoption of the various provisions of these rules, incorporating therein your reasons for overruling the suggestions urged by us.

Thank you for considering our views.

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