Hearing Date: September 27, 2005
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ITEM 5

RECONSIDERATION OF PRIOR STATEMENT OF DECISION PROPOSED STATEMENT OF DECISION

Penal Code Sections 290 and 290.4
Statutes 1996, Chapters 908 (AB 1562) and 909 (SB 1378)
Statutes 1997, Chapters 17 (SB 947), 80 (AB 213), 817 (AB 59), 818 (AB 1303), 819 (SB 314), 820 (SB 882), 821 (AB 290) and 822 (SB 1078)
Statutes 1998, Chapters 485 (AB 2803), 550 (AB 2799), 927 (AB 796), 928 (AB 1927), 929 (AB 1745) and 930 (AB 1078)

97-TC-15
Sex Offenders: Disclosure by Law Enforcement Officers (Megan's Law)
(04-RL-9715-06)

Reconsideration Directed by Statutes 2004, Chapter 316, Section 3, Subdivision (a) (AB 2851)

EXECUTIVE SUMMARY

The sole issue before the Commission on State Mandates ("Commission") is whether the Proposed Statement of Decision accurately reflects any decision made by the Commission at the September 27, 2005 hearing on the above named test claim.[1]

Recommendation

Staff recommends that the Commission adopt the Proposed Statement of Decision, beginning on page two, which accurately reflects the staff recommendation on the test claim. Minor changes, including those that reflect the hearing testimony and vote count, will be included when issuing the final Statement of Decision.

If the Commission's vote on item 4, however, modifies the staff analysis, staff recommends that the motion on adopting the Proposed Statement of Decision reflect those changes, which will be made before issuing the final Statement of Decision. Alternatively, if the changes are significant, staff recommends that adoption of a Proposed Statement of Decision be continued to the December 2005 Commission hearing.

[1] California Code of Regulations, title 2, section 1188.1, subdivision (a).

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR COMMISSION DECISION ON: Penal Code Sections 290 and 290.4 Statutes 1996, Chapters 908 (AB 1562) and 909 (SB 1378), Statutes 1997, Chapters 17 (SB 947), 80 (AB 213), 817 (AB 59), 818 (AB 1303), 819 (SB 314), 820 (SB 882), 821 (AB 290) and 822 (SB 1078), Statutes 1998, Chapters 485 (AB 2803), 550 (AB 2799), 927 (AB 796), 928 (AB 1927), 929 (AB 1745) and 930 (AB 1078) Claim No. 97-TC-15 Directed by Statutes 2004, Chapter 316, Section 3, Subdivision (a) (AB 2851) Effective July 1, 2005	No. 04-RL-9715-06 *Sex Offenders: Disclosure by Law Enforcement Officers (Megan's Law)* PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Proposed for adoption on September 27, 2005)*

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on September 27, 2005. [Witness list will be included in the final Statement of Decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission [adopted/modified] the staff analysis to partially approve the test claim at the hearing by a vote of [vote count will be included in the final Statement of Decision].

The Commission finds, in years in which they are not suspended by the Legislature,[2] that the test claim statutes impose a reimbursable state mandate on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code sections 17514 and 17556, for all activities listed in the *Sex Offenders: Disclosure by Law Enforcement Officers*

[2] This program is suspended in the Fiscal Year 2005-2006 Budget Act, Statutes 2005, chapter 38, Item 8885-295-001, Schedule 3 (d).

(Megan's Law) Statement of Decision (97-TC-15)[3] except for: (1) those that implement a federal law and have costs that are, in context, de minimis; or (2) one that is no longer required because it is a one-time activity.

Except for the one-time activity, the modifications to the Commission's prior Statement of Decision are based on the case *San Diego Unified School District. v. Commission on State Mandates.*[4] The modifications are noted in strikeout at the end of this Statement of Decision.

BACKGROUND

Assembly Bill 2851 directs the Commission to reconsider whether the *Sex Offenders: Disclosure by Law Enforcement Officers (Megan's Law)* mandate constitutes a reimbursable program under article XIII B, section 6 of the California Constitution, as follows:

> Notwithstanding any other provision of law, by January 1, 2006, the Commission on State Mandates shall reconsider whether each of the following statutes constitutes a reimbursable mandate under Section 6 of Article XIII B of the California Constitution in light of federal statutes enacted and federal and state court decisions rendered since these statutes were enacted:
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> (a) Sex offenders: disclosure by law enforcement officers (97-TC-15; and Chapters 908 and 909 of the Statutes of 1996, Chapters 17, 80, 817, 818, 819, 820, 821, and 822 of the Statutes of 1997, and Chapters 485, 550, 927, 928, 929, and 930 of the Statutes of 1998).

The Test Claim Statute

Since the 1940s, Penal Code section 290[5] has required persons convicted of certain sex offenses to register as sex offenders. Section 290[6] applies automatically to the offenses listed, and imposes on convicted offenders a lifelong obligation to register. The offender must appear in person to register with the police department of the city in which he or she resides, or with the sheriff's department if he or she resides in an unincorporated area or city with no police department. The offender has five working days to register after release from custody or on probation, or after coming into, or changing his or her residence within, any city or county.[7]

The state Department of Justice (DOJ) operates a 900 number and a website for public inquiries as to a whether an individual is a registered sex offender. The DOJ also sends to law

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[3] See Exhibit A to the Final Staff Analysis, Item 4, adopted September 27, 2005, page 383, hereafter referred to as Exhibit A.

[4] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*;

[5] Added by Statutes 1947, chapter 1124.

[6] All statutory references are to the Penal Code unless otherwise indicated.

[7] See <www.meganslaw.ca.gov/registration/law.htm> as of May 27, 2005.

enforcement agencies a CD-ROM or other electronic media that contains offender information. The CD-ROM must be made available to individuals who request it.

Program Amendments

The registration program has been amended many times over the years. The original test claim consists of the following 16 amendments to Penal Code sections 290 and 290.4.

Statutes 1996, chapter 908 – This bill authorizes law enforcement to disclose sex offender registration information that is necessary to protect the public (but not victim information). It requires DOJ to provide a CD-ROM or other electronic medium with sex-offender information to law enforcement agencies. It also revises the 900-number provisions (DOJ is required to operate a 900-number for people to call and find out if a person is an offender). The Senate analysis of this bill states that the bill implements the federal Megan's law (summarized below).

Statutes 1996, chapter 909 – This bill reduces the registration period from 14 to 5 working days of the offender coming into the jurisdiction, and reduces the annual updating period from 10 to 5 working days of the offender's birthday. It makes these changes applicable to name changes. It requires registering agencies to notify persons of the 5-day requirement.

Statutes 1997, chapter 17 – This is a code maintenance bill that makes no substantive changes.

Statutes 1997, chapter 80 – This bill clarifies that an offender who was convicted in another state is required to register if the offense would have required the offender to register in California if committed here. It requires the Attorney General (AG) to work with law enforcement to determine if the registry is meeting local needs, and to work with other state's AGs on related issues.

Statutes 1997, chapter 817 – This bill amends kidnapping laws to increase penalties, and makes specified kidnapping provisions subject to the offender registration requirements.

Statutes 1997, chapter 818 – This bill adds the following offenses for which an offender must register: pimping or pandering involving a minor, aggravated sexual assault of a child, and solicitation to commit sexual assault. It requires sexually violent predators to verify their registration every 90 days. It also provides for the exchange of specified information with the DOJ concerning a patient committed to specified mental health facilities as a sexually violent predator.

Statutes 1997, chapter 819 – This bill requires juveniles to register for specified additional offenses. It also requires offenders to register at community colleges (in addition to the University of California and California State University campuses under prior law) if domiciled at the school's facility.

Statutes 1997, chapter 820 – This bill requires offenders who have no residence address to register every 90 days (in addition to the requirement to register within five days of coming into the city or county).

Statutes 1997, chapter 821 – This bill extends the registration requirement to persons found guilty in the guilt phase of a trial for an offense subject to registration but who is found not guilty by reason of insanity. Also, it exempts a person from registering who was convicted of sodomy or oral copulation between consenting adults prior to January 1, 1976, under specified conditions, and would require the DOJ to remove that person from the Sex Offender Registry. The bill prohibits any entity from charging a fee to register or update a registration. It requires the offender to preregister upon incarceration, placement, commitment, or before release on probation and prohibits the offender's release until he or she has signed the form and provided the address information required. Where the offender is to be released on probation, the bill requires the probation officer to inform the offender of the requirement to register, and provides that an offender required to preregister shall only be preregistered once.

Statutes 1997, chapter 822 – This bill extends the sunset date for the operation of the 900 number and the CD-ROM distribution to local law enforcement agencies to January 1, 2001. It requires DOJ to prepare a pamphlet for people requesting information from the 900 number, and who provide an address.

Statutes 1998, chapter 485 – This is a code maintenance bill that makes no substantive changes.

Statutes 1998, chapter 550 – This bill requires the CD-ROM distribution to local law enforcement be monthly rather than quarterly. It also restricts living arrangements of offenders released on parole.

Statutes 1998, chapter 927 – This bill authorizes any child care custodian, as defined, or any private or public school or day care employee who receives information from a law enforcement entity to disclose specified information in the manner and to the extent authorized by the law enforcement entity. It immunizes from civil liability any public or private educational institution, day care facility, any employee thereof, or any child-care custodian who in good faith disseminates that information.

Statutes 1998, chapter 928 – This bill requires offenders to provide adequate proof of residence, as specified. If the offender fails to provide proof of residence within 30 days of when the offender is allowed to register, he or she is guilty of a misdemeanor. The bill gives victims of crime the right to be notified by the district attorney when the defendant is convicted of any number of specified sex offenses. It also authorizes courts as a condition of probation to order offenders to stay away from victims.

Statutes 1998, chapter 929 – Designated a technical clean-up bill, this bill requires offenders to reregister when changing addresses within a city or county, and requires local law enforcement to submit the registrations, including annual updates and changes, into DOJ's Violent Crime Information Network. It requires offenders to inform law enforcement of a change of address or location, whether within the jurisdiction where the offender is currently registered, or in a new jurisdiction (including outside California). For purposes of some offender provisions, the bill includes in the definition of "law enforcement agency" "every local agency expressly authorized by statute to investigate or prosecute violators."

Statutes 1998, chapter 930 – This bill amends provisions regarding disclosure of information by law enforcement. It immunizes from civil liability any public or private school, day care facility, or any employee thereof, or any child-care custodian, from good-faith information disclosure.

Federal "Megan's Law"

There are three federal enactments that concern the test claim statutes, as follows:

- The Wetterling Act, which was enacted by section 170101 of the Violent Crime Control and Law Enforcement Act of 1994,[8] encourages states to establish an effective sex offender registration system.
- Megan's Law,[9] which amended the provisions of the Wetterling Act, relates to the release of registration information.
- The Lychner Act,[10] which makes further amendments to the Wetterling Act, contains provisions to ensure the nationwide availability of sex offender registration information to law enforcement agencies.

The collective result of these enactments is codified in 42 U.S.C. 14071-14072 (referred to below as "section 14071")[11] and represents the federal law in this matter. The federal Department of Justice issued guidelines for state compliance with the original version of the Wetterling Act[12] and has published guidelines to implement Megan's Law and clarify other issues concerning Wetterling Act compliance, or section 14071.[13]

Section 14071 provides a financial incentive for states to establish 10-year registration requirements for persons convicted of certain crimes against minors and sexually violent offenses and to establish a more stringent set of registration requirements for a sub-class of highly dangerous sex offenders characterized as "sexually violent predators." States that fail to

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[8] Title 42 United States Code section 14071, Public Law 102-322, 108 Stat. 1796, 2038.

[9] Title 42 United States Code section 14071, Public Law 104-145, 110 Stat. 1345, May 17, 1996.

[10] Title 42 United States Code section 14071, Public Law 104-236, 110 Stat. 3096, 3097, October 3, 1996.

[11] Title 42 United States Code section 14072 is not relevant to the test claim as it specifically deals with the FBI database.

[12] 61 Federal Register 15110 (April 4, 1996), Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexual Violent Offender Registration (Exhibit A, p. 1529).

[13] 64 Federal Register 572 (Jan. 5, 1999) and 64 Federal Register 3590 (Jan. 22, 1999), Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexual Violent Offender Registration (Exhibit A, p. 1547).

establish such systems within three years (subject to a possible two-year extension) face a 10 percent reduction in funding for drug enforcement.[14]

Commission Statement of Decision

On August 23, 2001, the Commission adopted the *Sex Offenders: Disclosure by Law Enforcement Officers* Statement of Decision (97-TC-15).[15] The Commission first determined that additional crimes for which a person is required to register as a sex offender, and new time lines within which to register for specified sex offenders, do not impose a reimbursable state mandate under article XIII B, section 6 because the activity defines a new crime or changes an existing definition of a crime. The Commission next determined that the following activities were not a new program or higher level of service: changing existing timelines within which to register, providing notice of a duty to register, and destroying specified records under certain conditions. The Commission also found that two of the activities were federal mandates: advising a convicted sex offender of a possible duty to register in any other state where the offender resides, and releasing relevant information about a convicted sex offender that is necessary to protect the public. The remaining activities were found to exceed the federal mandate in Megan's Law and therefore constitute a reimbursable mandate. These were outlined in the Commission's original Statement of Decision as follows:

- **Violent Crime Information Network:** This activity requires a local law enforcement agency to submit sex-offender registrations from its jurisdictions directly into the Department of Justice Violent Crime Information Network (§ 290 (a)(1)(F), Stats. 1998, ch. 929).
- **Removal of registration for decriminalized conduct:** This activity requires a local law enforcement agency to remove an offender's registration from its files within 30 days of receiving a notification to do so from the Department of Justice (§ 290 (a)(2)(F)(i)(III), Stats. 1997, ch. 821).
- **Pre-register:** This activity requires the admitting officer of a local law enforcement agency to pre-register a convicted sex offender but only if the local law enforcement agency is the place of incarceration. This pre-registration consists of a pre-registration statement in writing, signed by the person, giving information that is required by the Department of Justice, fingerprints and a current photograph of the offender (§ 290 (e)(1)(A-C), Stats. 1997, ch. 821).
- **Contents of registration upon release:** A convicted sex offender has always had the duty to register upon release with the local law enforcement agency in which the

[14] Title 42 United States Code section 3756 (Exhibit A, p. 1584a).

[15] Exhibit A, page 1707.

offender will reside.[16] While most of the activities related to this registration falls on the convicted sex offender, the following related activities are imposed on the registering local law enforcement agency: (§ 290 (e)(2)(A-E))

- The local law enforcement agency must ensure that the signed statement that a convicted sex offender must fill out upon registration contains the name and address of the offender's employer, and the address of the offender's place of employment if that is different from the employer's main address.
- The local law enforcement agency must ensure that the convicted sex offender includes information related to any vehicle regularly driven by the offender on the registration.
- The local law enforcement agency must ensure that the convicted sex offender upon registering has adequate proof of residence, which is limited to a California driver's license, California identification card, recent rent or utility receipt, printed personalized checks or other recent banking documents showing that person's name and address, or any other information that the registering official believes is reliable. If the offender has no residence and no reasonable expectation of obtaining a residence in the foreseeable future, the local law enforcement agency shall provide the offender with a statement stating that fact.[17]

- **Notice of Reduction of Registration Period:** This activity requires that convicted sex offenders who were required to register before January 1, 1997, shall be notified when the offender next re-registers of the reduction in the registration period from 14 days to 5 working days. The one-time notice must be in writing from the local law enforcement agency responsible for registering the individual (§ 290 (l)(1)).[18]
- **High-Risk Sex Offenders:** The test claim legislation imposes some new activities on specific local law enforcement agencies related to high-risk offenders. These activities are as follows:

[16] Actually, this has been required since the 1940s.

[17] The parameters and guidelines state, "If the offender does not have a residence, and no reasonable expectation of obtaining a residence in the foreseeable future, then the local law enforcement agency shall obtain a statement to that effect from the sex offender." (§ 290, subd. (e)(2)(E).) (Exhibit A, p. 1868).

[18] Under current law, sex offenders are also required to re-register every 90 days, and must be notified of their increased registration obligations whenever they register (§ 290 (l)(2)).

- Sheriffs' offices must make available to high-risk offenders a pre-printed form from the Department of Justice regarding re-evaluation by the Department of Justice to be removed from the high-risk classification.[19]
- A local law enforcement agency must maintain statistical information on high-risk offenders and photographs that it receives four times a year from the Department of Justice.[20]

- **CD-ROM**: This activity requires that the sheriff's department in each county, municipal police departments of cities with a population of more than 200,000 and other applicable law enforcement agencies to provide the necessary equipment for the public to access the sex offender information provided by the Department of Justice on CD-ROM or another electronic medium (§ 290.4 (a)(4)(A)).
- **Records Retention:** This activity requires a local law enforcement agency to maintain records of those persons requesting to view the CD-ROM or other electronic medium for a minimum of five years (§ 290.4 (l)), and to maintain records of the means and dates of dissemination for a minimum of five years related to the disclosure of high-risk offenders (§ 290.45 (c), former § 290 (o)).

Commission Parameters and Guidelines

The Commission adopted parameters and guidelines[21] for the test claim statutes in March 2002. In addition to the activities listed above, the following one-time activities were added under the heading "Reimbursable Costs."

For each eligible claimant, the following activities are eligible for reimbursement:

A. One-Time Activities

1. Train staff on implementing the reimbursable activities listed in Section IV, activities 2 through 13, of these parameters and guidelines. (One-time activity per employee.)
2. Develop internal policies, procedures, and manuals to implement *Sex Offenders: Disclosure by Law Enforcement Officers ("Megan's Law").*
3. Notify every registered sex offender convicted prior to January 1, 1997, within the claimant's jurisdiction of the reduction in the time to register or reregister from 14 days to 5 days. (Pen. Code, § 290, subd. (l)(1).)[22] *(Reimbursement period begins October 8, 1997.)*

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[19] This requirement is currently in section 290.45, subdivision (b)(1)(G)(ii).

[20] This requirement is currently in section 290.45, subdivision (b)(2).

[21] Exhibit A, page 1865.

[22] As amended by Statutes 1997, chapter 821, an urgency statute effective October 8, 1997.

State Agency Positions

Legislative Analyst's Office: The Legislative Analyst's Office (LAO), in its publication *New Mandates: Analysis of Measures Requiring Reimbursement* (December 2003),[23] reviews 23 Commission decisions, including *Sex Offenders: Disclosure by Law Enforcement Officers.*

LAO asserts that one activity in the parameters and guidelines (Ps&Gs) appears inconsistent with the Commission's Statement of Decision.

> Specifically, the Ps&Gs would allow local law enforcement agencies to claim state reimbursement for "the development of internal policies, procedures, and manuals to implement Megan's Law." This provision appears to allow localities to seek state reimbursement for *all* policies, procedures, and manuals related to Megan's Law, including those which relate to federally mandated aspects of the state law. For this reason, we recommend the Legislature request the commission to review the Ps&Gs to ensure that local governments seek reimbursement for only the development of internal policies, procedures, and manuals that relate to state-reimbursable activities.[24]

No other state agency has submitted comments on this reconsideration, and no comments were submitted on the draft staff analysis.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[25] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[26] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B

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[23] <http://www.lao.ca.gov/2003/state_mandates/state_mandates_1203.html> as of June 6, 2005.

[24] *Ibid.*

[25] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[26] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

impose."[27] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[28]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[29]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[30] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[31] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[32]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[33]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[34] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[35]

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[27] *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

[28] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[29] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[30] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[31] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[32] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[33] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[34] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[35] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue 1: What is the effective date of the Commission's decision on reconsideration?

Assembly Bill 2851, an urgency statute that became effective on August 25, 2004, directs the Commission to reconsider its statement of decision on the *Sex Offenders: Disclosure by Law Enforcement Officers* test claim. According to the legislative history, Assembly Bill 2851 implements the changes recommended by the Assembly Special Committee on State Mandates. This committee was established in 2003 to review all reimbursable state mandates, particularly those that have been suspended or deferred, and to recommend reforms to the reimbursement system.

The parameters and guidelines for the *Sex Offenders* test claim were adopted in March 2002, with a reimbursement period beginning July 1, 1996, or later (some activities were reimbursable starting September 25, 1996, October 8, 1997, or January 1, 1999, depending on the effective date of the test claim statute).

Assembly Bill 2851, however, does not specify the effective date for the Commission's decision on reconsideration.[36] The question is whether the Legislature intended to apply the Commission's decision on reconsideration retroactively back to the original reimbursement period of July 1, 1997 (i.e., to reimbursement claims that have already been filed, some of which may have been paid), or to prospective claims filed in future budget years.

Unlike other statutes directing reconsideration of Commission decisions (e.g., Sen. Bill No. 1895), Assembly Bill 2851 is *not* a trailer bill to the Budget Act of 2004. Thus, for the reasons below, the Commission finds the Legislature intended that the Commission's decision on reconsideration apply prospectively to future budget years only, beginning July 1, 2005.

A statute may be applied retroactively only if the statute contains "express language of retroactively [sic] or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application."[37] In *McClung v. Employment Development Department*, the California Supreme court explained this rule as follows:

> "Generally, statutes operate prospectively only." [Citation omitted.] "The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly … For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." [Citation omitted.] "The presumption against statutory

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[36] In this respect, Assembly Bill 2851 is different than another recent statute directing the Commission to reconsider a prior final decision. Statutes 2004, chapter 227, which directs the Commission to reconsider Board of Control test claims relating to regional housing, states in Section 109, "[a]ny changes by the commission shall be deemed effective July 1, 2004."

[37] *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 475.

> retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." [Citation omitted.]
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> This is not to say that a statute may never apply retroactively. "A statute's retroactivity is, *in the first instance, a policy determination for the Legislature* and one to which courts defer absent 'some constitutional objection' to retroactivity." [Citation omitted.] But it has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." [Citation omitted.] *"A statute may be applied retroactively only if it contains express language of retroactively [sic] or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application*." [Citation omitted.] (Emphasis added.)[38]

There is nothing in the plain language of Assembly Bill 2851 or its legislative history to suggest that the Legislature intended to apply the Commission's decision on reconsideration retroactively. In the absence of clear legislative intent to the contrary, the Commission finds that Assembly Bill 2851 is not to be applied retroactively, and the period of reimbursement for the Commission's decision on reconsideration begins July 1, 2005. Thus, to the extent the Commission modifies its prior decision in *Sex Offenders: Disclosure by Law Enforcement Officers*, the changes would become effective for reimbursement claims filed for the 2005-2006 fiscal year.

Reimbursement for this mandate, however, has been suspended in the 2004-2005,[39] and 2005-2006[40] State Budget Acts pursuant to Government Code section 17581, which states in pertinent part:

> (a) No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year and for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year if all of the following apply:
> (1) The statute or executive order, or portion thereof, has been determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of local agencies pursuant to Section 6 of Article XIIIB of the California Constitution.
> (2) The statute or executive order, or portion thereof, or the commission's test claim number, has been specifically identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year. For purposes of this paragraph, a mandate shall be considered to have been specifically identified by the Legislature only if it has been included within the schedule of reimbursable mandates shown in the Budget Act and it is

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[38] *Ibid.*

[39] Statutes 2004, chapter 208, Item 0820-295-0001, Schedule (3), Provision 5.

[40] Statutes 2005, chapter 38, Item 8885-295-0001, Schedule (3)(d).

specifically identified in the language of a provision of the item providing the appropriation for mandate reimbursements.

This means that local agencies are not required to perform the activities in the original *Sex Offenders* Statement of Decision in years in which it is suspended in the state budget. Any local agency performing these activities would be doing so voluntarily, at its discretion. Activities performed at the discretion of local agencies are not reimbursable.[41] Therefore, the Commission finds that in years this mandate is suspended pursuant to Government Code section 17581, no reimbursement is required.

Issue 2: Does the test claim legislation constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution in light of federal statutes enacted and federal court decisions rendered since the test claim statutes were enacted?

Assembly Bill 2851 directs the Commission to reconsider this claim "in light of federal statutes enacted and federal and state court decisions rendered"[42] since the test claim statutes were enacted. Administrative agencies, such as the Commission, are entities of limited jurisdiction that have only the powers that have been conferred on them, expressly or by implication, by statute or constitution.[43]

Therefore, given the legislative direction in Assembly Bill 2851 to reconsider the prior decision, the scope of review here is limited to applying statutes or cases adopted since the original Statement of Decision was adopted (August 2001), to the activities found reimbursable (as listed above) in the Commission's original Statement of Decision.

Federal statutory amendment: Since the test claim statute was enacted, the federal law has been amended to add, "The release of information under this paragraph shall include the maintenance of an Internet site containing such information that is available to the public and instructions on the process for correcting information that a person alleges to be erroneous."[44] California implemented this federal provision by Statutes 2004, chapter 745 (Assem. Bill No. 488). Since these provisions were enacted after the original Statement of Decision, however, they are outside the Commission's jurisdiction and beyond the scope of this reconsideration.

The Commission is not aware of federal court decisions that would impact this test claim.

Issue 3: Does the test claim legislation constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution in light of state court decisions rendered since the test claim statutes were enacted?

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[41] *Kern High School Dist., supra,* 30 Cal.4th 727, 743.

[42] Statutes 2004, chapter 316, section 3, subdivision (a).

[43] *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

[44] Public Law 108-21 (April 30, 2003), Title 42 United States Code section 14071 (e)(2).

There have been 11 published state court decisions related to mandates rendered since 1996 when the first test claim statute was enacted. Of these, only *San Diego Unified School Dist. v. Commission on State Mandates*[45] warrants discussion.

***San Diego Unified School Dist.* case:** The California Supreme Court in *San Diego Unified School Dist.* discussed whether the hearing procedures set forth in Education Code section 48918[46] should be considered to have been adopted to implement a federal due process mandate (making the costs nonreimbursable under article XIII B, section 6).[47]

In deciding the issue, the court relied on the reasoning of *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal. App. 4th 805, which discussed whether ancillary county costs for providing indigent criminal defense services was reimbursable. The court found that the test claim statute merely implemented the requirements of federal constitutional law and that even in the test claim statute's absence, the counties would be responsible for providing the services under the Sixth Amendment of the U.S. Constitution. The court also ruled the "procedural protections that the Legislature had built into the statute … were merely incidental to the federal rights codified by the statute, and their 'financial impact' was de minimis." [48]

> Accordingly, the Court of Appeal concluded, the Penal Code section [test claim statute] in its entirety—that is, *even those incidental aspects of the statute that articulated specific procedures, not expressly set forth in federal law, for the filing and resolution of requests for funds*—constituted an implementation of federal law, and hence those costs were nonreimbursable under article XIII B, section 6. [Emphasis in original.] [¶…¶]
>
> In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. … such incidental procedural requirements, producing at most a de minimis added cost, should be viewed as *part and parcel* of the underlying federal mandate and hence nonreimbursable. [Emphasis added.] [¶…¶]

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[45] *San Diego Unified School Dist., supra,* 33 Cal.4th 859.

[46] The court stated, "The District asserts that in this respect, *section 48918* constitutes a 'new program or higher level of service' related to an existing program under article XIII B, section 6 of the state Constitution and under Government Code section 17514. We shall assume for analysis that this is so." [Emphasis in original.] *Id.* at page 885.

[47] *Id.* at page 888.

[48] *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th. 805, 817.

> In light of these considerations, we agree with the conclusion reached by the Court of Appeal in *County of Los Angeles II, supra,* 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304: for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law--and whose costs are, in context, de minimis--should be treated as *part and parcel* of the underlying federal mandate.[49] [Emphasis added.]

The issue, therefore, is whether the activities found reimbursable in the original Statement of Decision are "part and parcel" of the federal Megan's law, using the Supreme Court's two elements: first, whether the activity is intended to implement the federal mandate, and second, whether the activity's costs are, in context, de minimis. If the activity is part and parcel of the federal law, reimbursement for it is not required under article XIII B, section 6.[50]

Three of the reimbursable activities in the original Statement of Decision were enacted by Statutes 1996, chapter 908[51] which, according to its legislative history, was enacted to implement the federal Megan's Law[52] (P.L. 104-145; 42 U.S.C. 14071(d)).

- For sheriff's departments in each county, municipal police departments of cities with a population of more than 200,000, to provide the necessary equipment and staff assistance for the public to access the sex offender information provided by the Department of Justice on CD-ROM or other electronic medium, and to obtain information from individuals requesting access to the CD-ROM as required by the Department of Justice. (Pen. Code, § 290.4, subd. (a)(4)(A).)
- Provide high-risk sex offenders a printed form from the Department of Justice regarding reevaluation in order to be removed from the high-risk classification. (Pen. Code, § 290.45, subd. (b)(1)(G)(ii), former Pen. Code, § 290, subd. (n)(1)(G)(ii).)
- Maintain such photographs and statistical information concerning high-risk sex offenders as is received quarterly from the Department of Justice. (Pen. Code, § 290.45, subd. (b)(2), former Pen. Code, § 290 subd. (n)(2).)

CD-ROM: The first activity, disseminating information via CD-ROM, implements a part of the federal statute that states, "The State or any agency … shall release relevant information that is necessary to protect the public concerning a specific person required to register under this

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[49] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 889-890.

[50] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 888; see also Government Code sections 17513 and 17556, subdivision (c).

[51] Statutes 1996, chapter 908 originally contained a sunset provision making it operative until January 1, 2004, but it was extended to January 1, 2007 (Stats. 2004, ch. 731).

[52] Senate Committee on Criminal Procedure, Analysis of Assembly Bill No. 1562 (1995-96 Reg. Sess.) amended June 3, 1996, pages f-h (See Exhibit D to the Final Staff Analysis, Item 4, adopted September 27, 2005).

section…."[53] There is no requirement in the federal statute to use local law enforcement agencies to release the information. The state could have released the information directly to the public without using local law enforcement. Moreover, the method of requiring law enforcement to provide equipment for and assist in the use of CD-ROMs for all of California's counties and large city police departments appears to significantly increase the cost of compliance with the federal mandate, thereby creating more than a de minimis added cost. Therefore, the Commission finds that the CD-ROM activity is not part and parcel of the federal mandate and is therefore reimbursable under article XIII B, section 6.

High-Risk Offenders: As to the two activities above concerning high-risk sex offenders, these do not implement the federal mandate. The federal Megan's law does not define or mention high-risk offenders,[54] so activities touching on high-risk offenders are also not part and parcel of the federal mandate and are therefore reimbursable under article XIII, section 6.

Violent Crime Information Network: Another activity found reimbursable in the original Statement of Decision concerns the Violent Crime Information Network. This activity requires a local law enforcement agency to submit sex-offender registrations from its jurisdiction directly into the Department of Justice (DOJ) Violent Crime Information Network. Before this statute, (Stats. 1998, ch. 929) the law enforcement agency had to forward a copy of the change of address information to DOJ within three days after receipt of the information. (Former Penal Code, § 290 subd. (f)(1).)

This activity does implement the federal Megan's law provision that requires states to "ensure that the registration information is promptly made available to a law enforcement agency having jurisdiction where the person expects to reside and entered into the appropriate State records or data system." The federal provision also requires the state to "ensure that conviction data and fingerprints for persons required to register are promptly transmitted to the Federal Bureau of Investigation."[55] The requirement also produces a de minimis added cost (beyond the cost of the federal Megan's law). Therefore, the Commission finds that submitting the information into the Violent Crime Information Network is part and parcel of the federal mandate and is therefore not reimbursable.

Removal of registration for decriminalized conduct: This activity from the original Statement of Decision requires a local law enforcement agency to remove an offender's registration from its files within 30 days of receiving a notification to do so from the Department of Justice.

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[53] Title 42 United States Code section 14071 (e)(2) (Exhibit A, p. 1519).

[54] The federal Megan's Law guidelines mention designating risk levels to offenders as one approach to disseminating sex offender information. (64 Fed. Reg. 572) (Exhibit A, p. 1572).

[55] Title 42 United States Code section 14701 (b)(2)(A) (Exhibit A, p. 1517). The guidelines state, "The Act leaves states discretion in determining which state record system is appropriate for storing registration information …." (64 Fed. Reg. 572) (Exhibit A, p. 1567).

This activity does not implement the federal mandate. The federal Megan's Law does not mention removing sex offenders from the system. Therefore, this activity is not part and parcel of the federal mandate, and thus, is reimbursable.

Pre-register: This activity from the original Statement of Decision requires the admitting officer of a local law enforcement agency to pre-register a convicted sex offender but only if the local law enforcement agency is the place of incarceration. This pre-registration consists of a pre-registration statement in writing, signed by the person, giving information that is required by the Department of Justice, fingerprints and a current photograph of the offender.

The Commission finds that this activity does not implement the federal mandate, which only covers registration upon release, parole, supervised release, or probation,[56] and for which the registration requirement applies "except during ensuing periods of incarceration."[57] Therefore, this activity is not part and parcel of the federal mandate, and thus, is reimbursable.

Contents of registration upon release: The Statement of Decision found that the following activities are imposed on the registering local law enforcement agency: (1) ensure that the signed statement that a convicted sex offender must fill out upon registration contains the name and address of the offender's employer, and the address of the offender's place of employment if that is different from the employer's main address; (2) ensure that the convicted sex offender includes information related to any vehicle regularly driven by the offender on the registration; (3) ensure that the convicted sex offender upon registering has adequate proof of residence, which is limited to a California driver's license, California identification card, recent rent or utility receipt, printed personalized checks or other recent banking documents showing that person's name and address, or any other information that the registering official believes is reliable; and (4) if the offender has no residence and no reasonable expectation of obtaining a residence in the foreseeable future, the local law enforcement agency shall provide the offender with a statement stating that fact.

Requiring the offender's employment information implements the federal Megan's Law, which requires collecting employment information for offenders who work or attend school in states other than their states of residence.[58] According to the guidelines, "The 'registration information' the state must accept from such a registrant to comply with the Act is, at a minimum, information concerning the registrant's place of employment or the school attended in the state and his address in his state of residence."[59] This is an activity, therefore, that

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[56] Title 42 United States Code section 14701 (b) (Exhibit A, pp. 1516-1518).

[57] Title 42 United States Code section 14701 (b)(6) (Exhibit A, p. 1518).

[58] Title 42 United States Code section 14701 (b)(7)(B) (Exhibit A, p. 1518).

[59] 64 Federal Register 572, Exhibit A, page 1580. The Megan's Law federal guidelines also state, "the Act does not require a state to obtain information about a registrant's expected employment when it releases him, but a state may legitimately wish to know if a convicted child molester is seeking or has obtained employment that involves responsibility for the care of children." 64 Federal Register 572 (Exhibit A, pp. 1565-1566). It is sufficient that one provision in the federal law requires the employment information.

implements the federal Megan's Law. It also imposes a cost that is, in context, de minimis, because collecting employment information can be accomplished when collecting the offender's other information. Thus, the Commission finds that collecting employment information is part and parcel of the federal mandate and therefore, not reimbursable.

Requiring vehicle information does not implement the federal Megan's law, which does not require vehicle information from offenders. Therefore, the Commission finds that this activity is not part and parcel of the federal mandate, and thus, is reimbursable.

Requiring proof of residence verification does implement the federal Megan's law, which states, "procedures shall provide for verification of address at least annually."[60] For sexually violent predators, as defined, registration verification is required every 90 days after the date of the initial release or commencement of parole.[61] And requiring documents to verify the address is de minimis in the context of the mandated activities. Therefore, the Commission finds that this activity is part and parcel of the federal mandate, and thus is not reimbursable.

Requiring a statement from a person without a residence does not implement the federal Megan's law, which makes no mention of offenders without a residence. Thus, this is reimbursable.

Notice of Reduction of Registration Period: This activity requires that convicted sex offenders who were required to register before January 1, 1997, be notified of the reduction in the registration period from 14 days to 5 working days when the offender next re-registers. This is a one-time activity that has already been performed and reimbursed. Therefore, because it is no longer reimbursable, the Commission makes no finding on whether it implements the federal Megan's Law. The Commission does find, however, that because this is a one-time activity, it is no longer reimbursable.

Records Retention: This activity requires a local law enforcement agency to maintain records of those persons requesting to view the CD-ROM or other electronic medium for a minimum of five years, and to maintain records of the means and dates of dissemination for a minimum of five years related to the disclosure of high-risk offenders.

The federal Megan's law requires releasing relevant information necessary to protect the public concerning a specific person required to register as a sex offender.[62] However, the federal law does not mention keeping records of persons to whom the information is released. Therefore, the Commission finds that this records retention activity does not implement the federal Megan's Law, and is not part and parcel of the federal mandate, and thus, is reimbursable.

Comments of the Legislative Analyst's Office: As stated above, the LAO criticizes the parameters and guidelines for allowing local law enforcement agencies to claim state

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[60] Title 42 United States Code section 14701 (b)(3)(A). (Exhibit A, p. 1517). The guidelines state, "The particular approach to address verification is a matter of state discretion under the Act." (64 Fed. Reg. 572, Exhibit A, p. 1569).

[61] Title 42 United States Code section 14701 (b)(3)(B). (Exhibit A, p. 1517).

[62] Title 42 United States Code section 14701 (e)(2) (Exhibit A, p. 1519).

reimbursement for "the development of internal policies, procedures, and manuals to implement Megan's Law." This provision appears to allow localities to seek state reimbursement for *all* policies, procedures, and manuals related to Megan's Law, including those that relate to federally mandated aspects of the state law.[63]

"Developing policies, procedures, and manuals" are one-time activities in the original parameters and guidelines.[64] Since the parameters and guidelines were adopted in March 2002, these activities would have already been performed and reimbursed. The Commission finds that any change, if necessary, would be made at the parameters and guidelines phase.

CONCLUSION

The Commission finds, in years in which they are not suspended by the Legislature,[65] that the test claim statutes impose a reimbursable state mandate on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code sections 17514 and 17556, for all activities listed in the *Sex Offenders: Disclosure by Law Enforcement Officers (Megan's Law)* Statement of Decision (97-TC-15)[66] except for those that, based on the *San Diego Unified School Dist.* case, implement a federal law and have costs that are, in context, de minimis (except one that is no longer required because it is a one-time activity). The reimbursable activities from the Commission's prior Statement of Decision, with deletions noted in strikeout, are as follows:

- ~~**Violent Crime Information Network:** This activity requires a local law enforcement agency to submit sex offender registrations from its jurisdictions directly into the Department of Justice Violent Crime Information Network (§ 290 (a)(1)(F), Stats. 1998, ch. 929).~~
- **Removal of registration for decriminalized conduct:** This activity requires a local law enforcement agency to remove an offender's registration from its files within 30 days of receiving a notification to do so from the Department of Justice. (§ 290 (a)(2)(F)(i)(III), Stats. 1997, ch. 821)
- **Pre-register:** the admitting officer of a local law enforcement agency must pre-register a convicted sex offender but only if the local law enforcement agency is the place of incarceration. This pre-registration consists of a pre-registration statement in writing, signed by the person, giving information that is required by the Department of Justice, fingerprints and a current photograph of the offender. (§ 290 (e)(1)(A-C), Stats. 1997, ch. 821)

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[63] <http://www.lao.ca.gov/2003/state_mandates/state_mandates_1203.html> as of June 6, 2005.

[64] See Exhibit A, page 1867.

[65] This program is suspended in the Fiscal Year 2005-2006 Budget Act, Statutes 2005, chapter 38, Item 8885-295-001, Schedule 3 (d).

[66] See Exhibit A, page 1707.

- **Contents of registration upon release:** the following related activities are imposed on the registering local law enforcement agency: (§ 290 (e)(2)(A-E))
    - ~~The local law enforcement agency must ensure that the signed statement that a convicted sex offender must fill out upon registration contains the name and address of the offender's employer, and the address of the offender's place of employment if that is different from the employer's main address.~~
    - The local law enforcement agency must ensure that the convicted sex offender includes information related to any vehicle regularly driven by the offender on the registration.
    - ~~The local law enforcement agency must ensure that the convicted sex offender upon registering has adequate proof of residence, which is limited to a California driver's license, California identification card, recent rent or utility receipt, printed personalized checks or other recent banking documents showing that person's name and address, or any other information that the registering official believes is reliable.~~ If the offender has no residence and no reasonable expectation of obtaining a residence in the foreseeable future, the local law enforcement agency shall provide the offender with a statement stating that fact.[67]
- ~~**Notice of Reduction of Registration Period:** This activity requires that convicted sex offenders who were required to register before January 1, 1997, shall be notified when the offender next re-registers of the reduction in the registration period was from 14 days to 5 working days. The one-time notice must be in writing from the local law enforcement agency responsible for registering the individual. (§ 290 (l)(1)).~~[68]
- **High-Risk Sex Offenders:** Sheriffs' offices must make available to high-risk offenders a pre-printed form from the Department of Justice regarding re-evaluation by the Department of Justice to be removed from the high-risk classification.[69] A local law enforcement agency must maintain statistical information on high-risk offenders and photographs that it receives four times a year from the Department of Justice.[70]

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[67] The parameters and guidelines state, "If the offender does not have a residence, and no reasonable expectation of obtaining a residence in the foreseeable future, then the local law enforcement agency shall obtain a statement to that effect from the sex offender." (§ 290, subd. (e)(2)(E).) (See Exhibit A, p. 1868).

[68] As stated in the analysis, the Commission makes no finding as to whether this activity implements federal law. Rather, as a one-time activity, the Commission finds that it would already have been performed and reimbursed.

[69] This requirement is currently in section 290.45, subdivision (b)(1)(G)(ii).

[70] This requirement is currently in section 290.45, subdivision (b)(2).

- **CD-ROM**: the sheriff's department in each county, municipal police departments of cities with a population of more than 200,000 and other applicable law enforcement agencies must provide the necessary equipment for the public to access the sex offender information provided by the Department of Justice on CD-ROM or another electronic medium. (§ 290.4 (a)(4)(A)).
- **Records Retention:** a local law enforcement agency must maintain records of persons requesting to view the CD-ROM or other electronic medium for a minimum of five years (§ 290.4 (l)), and to maintain records of the means and dates of dissemination for a minimum of five years related to the disclosure of high-risk sex offenders. (§ 290.45 (c), former § 290 (o)).