



## WHITE-COLLAR CRIME

## Expert Analysis

# The Need for 'Second Chances' After Suffering a Federal Conviction

Federal criminal convictions are accompanied by significant collateral consequences. The loss of civil rights in addition to the many burdens imposed by a loss of employment opportunities often makes starting over or self-rehabilitation difficult for a white-collar defendant, even when his or her conviction was an isolated incident or the result of a youthful mistake. Rather, for decades after, most individuals with white-collar felony convictions find their hands tied when trying to obtain gainful employment, support their families, or lead productive and socially useful lives.

This is true even where an individual has offered substantial assistance and cooperation to the government in the investigation and prosecution of wrongdoing. As acknowledged in legislation recently introduced by Senator Jim Webb entitled the Prison Litigation Reform Act, the poor reintegration of convicted individuals into society is one of many real problems with the criminal justice system.<sup>1</sup> Although in many instances, a defendant's conduct may be so pervasive or heinous that reintegration into society is not desirable. In the majority of situations, however, reintegration is appropriate.

Years ago, federal law recognized the utility of second chances, at least in the context of youthful offenders, but since then has taken a step backwards. Now, as most federal felons have learned, the only route to a second chance is the rarely-granted federal pardon. States, such as New York, and federal agencies, such as the SEC, have mechanisms which, in theory, permit someone convicted of an isolated offense to recover their place in society, at least to some extent, but, in the case of the SEC, the agency rarely makes such opportunities available. The lack of second chances in the federal system is unnecessarily harmful to the individual and to society. Under the current approach, rehabilitated, productive people are needlessly sidelined and marginalized based on a single and sometimes youthful instance of poor judgment.

The ripple effects of a federal conviction are widespread and lasting and significantly burden those with an eye towards beginning "anew." For example, a 44 year-old father of two finds that his career and



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ability to support his family is threatened by the existence of a single, 20-year-old felony conviction for mail fraud. At the time of his guilty plea, the man cooperated fully with the U.S. Attorney's Office and the SEC and testified on behalf of the government at various prosecutions. In addition, he made full restitution for all profits made as a result of the illegal actions undertaken in his first post-college job.

Despite living an exemplary, law-abiding life thereafter, 20 years later he found that this

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conviction prevents him from advancing in his career because of corporate policy regarding employees with felony convictions. As a result, he likely would either lose his job or be unable to advance to the position he has earned after 20 years of loyal service. Before its repeal 20 years ago the Federal Youthful Offender Status laws provided a possible second opportunity. Today, no amount of restitution, good living or penance permits a court to provide any relief. Both society and the individual would benefit from some mechanism within the federal system that would allow rehabilitated, law abiding citizens to regain their rights and re-enter mainstream society, especially with respect to employment opportunities.

### Collateral Consequences

Someone convicted of a federal crime may lose a number of civil rights. The Fourteenth Amendment of the U.S. Constitution expressly recognizes the

power of the states to deny a felon the right to vote. Accordingly, many states restrict a convicted individual's right to vote for a specific period of time. A convicted felon also may lose the right to serve on a jury,<sup>2</sup> run for public office,<sup>3</sup> or enlist in the armed forces.<sup>4</sup>

Apart from the loss of civil rights, however, perhaps the most significant impact on a white-collar defendant is the loss of considerable employment opportunities. Usually, a convicted felon can not seek state licenses or bid on government contracts. In addition, federal regulatory agencies have the authority to bar the employment of individuals with felony convictions. For instance, a person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering may not be associated with any institution governed by the Federal Deposit Insurance Corporation.<sup>5</sup> Similarly, the Commodity Futures Trading Commission may refuse to register any individual convicted of certain white collar felonies.<sup>6</sup>

The Securities and Exchange Commission has the authority to censure, suspend or revoke the registration of any registered investment advisor or broker where that person has been convicted of any felony or certain enumerated offense, including securities violations, theft, forgery, counterfeiting, embezzlement, perjury, bribery, and mail fraud.<sup>7</sup> In addition, the SEC possesses the power to seek a court-ordered injunction against anyone convicted of a felony to bar future violations of securities laws.<sup>8</sup>

The collateral effects of such injunctive orders can sometimes be significantly damaging to enjoined parties. The collateral consequences, sometimes called "Bad Boy Provisions," include: the imposition of public disclosure requirements; the disallowance of certain exemption benefits available under security registration; the possible revocation of registration; bars against serving as officers or directors of certain publicly held companies; and loss of membership in SROs. The ultimate effect of these consequences can be the potential devastating loss of business or livelihood opportunities.

Beyond the impact on employment opportunities regulated by these government agencies, white-collar defendants also frequently encounter problems when seeking private employment. Private employers are legally entitled to inquire as to whether applicants have been convicted of a crime and run background checks.

Where a "direct relationship" exists between the conviction and the position sought, private

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employers can refuse to hire the individual.<sup>9</sup> For all these reasons, white collar defendants face a number of significant road blocks in finding employment in their known field of expertise or even a new profession.

### Defendant's Options

**Restoration of civil rights and removal of disabilities under federal law:** A presidential pardon is the most well-known way to restore rights lost as a result of a federal conviction. A pardon restores all civil rights, including the right to vote, and generally "relieves other disabilities that attach solely by reason of the commission or conviction of the pardoned offense."<sup>10</sup> In addition, because the loss of civil rights generally occur as a matter of state law, they also may be restored by state action.

In New York, certain defendants may seek a "Certificate of Relief from Disabilities."<sup>11</sup> Correction Law §700 establishes that a person is eligible to receive a certificate if he or she has been convicted of a crime or an offense, but has not been convicted of more than one felony. Such a certificate, issued by a state judge, provides that an individual can not be automatically barred from any employment because of the felony conviction.

These laws were enacted "to reduce the automatic rejection and community isolation that often accompany conviction of crimes" and "contribute to the complete rehabilitation of first offenders and their successful return to responsible lives in the community."

New York statutes provide that with respect to a "public agency" or "private employer," a certificate "shall create a presumption of rehabilitation in regard to the offense or offenses specified therein."<sup>12</sup> Often, in such cases, such a certificate can be negotiated as part of a plea package.

**Restoration in a particular area of work:** Many regulated industries also provide a mechanism for a convicted felon to seek reinstatement. For instance, federal law permits state agencies governing the insurance, medical and banking industries to allow convicted felons to seek reinstatement by describing their individual circumstances and reasons why the individual should be exempted from prohibition.<sup>13</sup>

In the financial industry, members of the Financial Industry Regulatory Authority (FINRA) can apply for permission to employ a person with a felony conviction or who is otherwise prohibited from association in the industry. This application process, referred to as a Membership Continuation or MC-400 application, considers the full circumstances surrounding the individual's past acts.<sup>14</sup>

In addition, the SEC Rules of Practice provide that an individual may apply to the SEC for consent to associate with an entity in the securities industry even if they previously have been "permanently barred."<sup>15</sup> In making such an application, the individual must make a showing that the proposed association is "consistent with the public interest."

Factors to be considered by the SEC include: (1) the time period since the imposition of the bar; (2) any restitution or similar action taken by the applicant to recompense any person injured by the misconduct that resulted in the bar; (3) the applicant's compliance with the order imposing the bar; (4) the applicant's employment during the period subsequent to imposition of the bar; (5) the capacity or position in which the applicant proposes

to be associated; and (6) the manner and extent of supervision to be exercised over such applicant and, where applicable, by such applicant.

The SEC generally has been reluctant to alter such administrative bars absent compelling circumstances, however. "This exercise of caution before modifying or lifting administrative bars ensures that the Commission, in furtherance of the public interest and investor protection, retains its continuing control over such barred individuals' activities."<sup>16</sup>

### Youthful Offender Status

Decades ago, a federal statute called the Federal Youth Corrections Act, applied to young adult offenders—those between the ages of 22 and 26—could be sentenced. The Supreme Court stated that the act "was designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket, to rehabilitate them and restore normal behavior patterns." The legislative history specifically noted the act's focus on young persons who had "made their first mistake."<sup>17</sup>

The act permitted judges to sentence youthful offenders to alternate sentences designed to rehabilitate. In addition, their convictions could be "set aside" automatically so that they could begin life "anew" without the burden and stigma of a felony conviction.<sup>18</sup>

A sentencing court could sentence a young adult offender under the act if, "after taking into consideration the previous record of the defendant

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as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent," the court determined that the young adult offender would benefit from such treatment.<sup>19</sup> Indeed, the Second Circuit required sentencing courts to make clear on the record that the judge considered all the relevant factors from the act when fashioning the sentence or rejected its application by explicitly finding that the defendant would not benefit from treatment under the act.<sup>20</sup>

Ultimately, the youth corrections act was repealed, effective November 1987, because it failed to fulfill its goals. Specifically, Congress found that under the act youthful offenders frequently spent more time incarcerated than persons sentenced as adults who were similarly situated.

Additional reasons cited for the repeal of the act was the failure by the Bureau of Prisons to comply with the act's mandate that youthful offenders be physically segregated from adult prisoners and to provide special treatment programs for youthful offenders.<sup>21</sup>

Although unsuccessful initially, the concept behind the Federal Youth Corrections Act certainly has merit and a place in today's criminal justice system.

Where an individual makes an isolated mistake, the ramifications need not carry forward for decades after the defendant's sentence is complete, barring employment opportunities as well as the exercise of one's civil rights. In the example set forth in the beginning of this article, the man was successful in having his conviction set aside after filing a writ of error coram nobis after showing that when he was convicted years ago, although the Federal Youth Corrections Act had been repealed by Congress, the effective date of its repeal had not yet occurred and, accordingly, that the sentencing court failed to properly consider the act.<sup>22</sup>

Although a good result for this individual, such an option is not available to individuals currently seeking redemption. Indeed, even if the Federal Youth Corrections Act were still in place today, it does not provide any relief for offenders who are not included in that very small age group. Many "older" offenders also are worthy of salvation. Like the mechanisms in place in state courts and certain regulated professions, the federal judicial system should be enabled to consider second chances in meritorious situations.



1. Editorial, "Reviewing Criminal Justice," New York Times (March 30, 2009).

2. 28 U.S.C. §1865(b)(5).

3. See e.g., 18 U.S.C. §2381 (a conviction of treason renders a defendant "incapable of holding any office"); §201(b) (sentencing court can disqualify defendant from public office for any bribery conviction).

4. 10 U.S.C. §504.

5. 12 U.S.C. §1818(e).

6. 7 U.S.C. §12a(2)(D).

7. 15 U.S.C. §80b-3(e)(2), (e)(3), (f) and §78o(b)(4)(B), (b)(6)(A).

8. See 15 U.S.C. §78u(d); 15 U.S.C. §77t(b) (1994).

9. See N.Y. Correct. Law. §752; EEOC Compliance Manual, §604 Appendices.

10. *Ex parte Garland*, 71 U.S. 333 (1866).

11. N.Y. Corrections Law, Art. 23, §8700-706.

12. *Id.* at §753(2).

13. See e.g., 18 U.S.C. §1033(c)(2).

14. FINRA By-Laws, art. III, §3(f); FINRA Procedural Rules 9520-27.

15. 17 C.F.R. §201.193(a).

16. *Edward I. Frankel*, Securities Exchange Act. Rel. No. 49002 (Dec. 20, 2003), 81 SEC Docket 3778, 3785; *Ciro Cozzolino*, Exchange Act Rel. No. 49001 (Dec. 29, 2003), 81 SEC Docket 3769, 3775.

17. *Dorszynski v. United States*, 418 U.S. 424, 433 (1974).

18. 18 U.S.C. §§5021, 4216 (repealed November 1987).

19. 18 U.S.C. §4216 (repealed November 1987).

20. *United States v. Negron*, 548 F.2d 1085 (2d Cir. 1977).

21. H.R. Rep. No. 98-1017 at 54-58 (1984).

22. *Shapiro v. United States*, 06 CV 6988 (S.D.N.Y. Oct. 10, 2006). Robert J. Anello was counsel for the defendant.