

## Reducing White-Collar Sentences Through the Second Chance Act

By Joseph F. Savage, Jr.  
and Abigail K. Hemani

The Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008), provides opportunities for white-collar offenders to reduce the amount of time spent in prison. While the Act's primary purpose is to fund prison-based rehabilitation initiatives, it also:

- provides an opportunity for early release for some elderly, nonviolent offenders;
- increases the percentage of one's sentence that can be served in a halfway house; and
- provides another basis for persuading judges that age, cost of imprisonment and prospects for rehabilitation are important mitigating sentencing factors.

White-collar offenders, who tend to be older and less likely to reoffend, may benefit most from these changes. The Second Chance Act offers a new tool for undoing the harsh sentences for economic crimes imposed under the U.S. Sentencing Guidelines. By affording the Bureau of

Prisons (BOP) additional discretion over the early release of nonviolent offenders to home confinement and all inmates to community confinement, the Act creates a method for ameliorating draconian Guidelines sentences that have already been imposed. And by emphasizing the sentencing goals of rehabilitation and harm reduction, rather than retribution and deterrence, the Act can also be used at sentencings to show that Congress rejects the Guidelines' uniformly severe sentences for economic crimes.

### AN EARLY-RELEASE EXPERIMENT

The Act's "Elderly and Family Reunification for Certain Nonviolent Offenders Pilot Program" directs the BOP to implement a pilot program in at least one institution where elderly, nonviolent offenders would become eligible to serve up to 25% of their sentence on home detention. To qualify, an inmate must be a nonviolent offender and at least 65 years old. Additionally, he must have already served the greater of 10 years or 75% of the term to which he was sentenced.

If implemented more broadly and permanently, the pilot program could have a significant impact on white-collar inmates, who are nonviolent and often over 65. For example, Enron's Jeffrey Skilling, Worldcom's Bernie Ebbers and Refco's Phillip Bennett would each become eligible for early release from prison to home confinement for the last four to six years of their sentences. If successful, the program logically could be extended to benefit younger inmates and those serving shorter sentences.

### GREATER USE OF COMMUNITY CONFINEMENT

The Act also includes a "Clarification of Authority To Place Prisoner in Community Corrections," which increases the percentage of a federal inmate's sentence that may be served in a "community correctional facility" (*i.e.*, a halfway house) prior to reentry into the community. Previously, the maximum portion of the sentence that could be served in a halfway house was limited by BOP regulations to the lesser of six months or the last 10% of the sentence. The Second Chance Act directs the BOP to "ensure" that prisoners spend the final portion of their term of imprisonment — up to a maximum of 12 months — "under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare" for reentry into the community, which "may include a community correctional facility." The Act also requires the BOP to promulgate new regulations to ensure that placement in a community correctional facility is determined on an individual basis, and that such placements are "of sufficient duration to provide the greatest likelihood of successful reintegration into the community."

This provision of the Act could substantially benefit those white-collar inmates who are sentenced to more moderate prison terms. For example, under the prior BOP regulations, an offender who had received a 20-month sentence could not have spent more than the final 60 days of that sentence in a community corrections center. Now, the BOP can send this inmate to a halfway house for the majority of his sentence.

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**Joseph F. Savage, Jr.** (jsavage@goodwinprocter.com), a member of this newsletter's Board of Editors, is a partner in the Boston office of Goodwin Procter LLP and a former federal prosecutor. **Abigail K. Hemani** (ahemani@goodwinprocter.com) is a partner in the firm's New York office. Both are members of Goodwin Procter LLP's White Collar Crime and Government Investigations Group.

## REDEFINING THE RELEVANT SENTENCING CONSIDERATIONS

In addition to the potential benefits to incarcerated white-collar inmates, the philosophy reflected in the Act and its legislative history may also be a useful tool in obtaining reduced white-collar sentences. By passing the Second Chance Act, Congress has now somewhat shifted the focus of the criminal-justice system away from the objectives of general deterrence and retribution. Instead, the Act is a victory for the "reentry movement" — a movement driven by the view that the primary goal of sentencing should be harm-reduction, rather than punishment. *See* Michael M. O'Hear, *The Second Chance Act and the Future of Reentry Reform*, 20 Fed. Sent. R. 75, 77 (2007).

This shift in focus may be particularly relevant to white-collar offenders. When the U.S. Sentencing Guidelines were first implemented by the Sentencing Commission in 1987, they were generally intended to mirror existing sentencing practices. However, the Commission deliberately and unwisely chose to impose sentences for white-collar crimes that were more severe than those of the past. This decision was exacerbated by the post-Enron wave of increased economic-crime penalties, which were designed almost exclusively to "deter and punish economic and white collar crimes." Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary (May 1, 2003). By passing the Second Chance Act, Congress has signaled federal judges that community confinement and home detention are viable sentencing options for white-collar offenders, and that age, likelihood of recidivism, rehabilitation and risk of community harm are valid sentencing considerations.

Additionally, white-collar offenders can benefit from the focus on fiscal responsibility that clearly underlies the Second Chance Act. In the House Committee Report for the Act, Congress discusses the financial burden placed upon the federal government by prison overcrowding. "The Federal prison population has increased more than seven-fold over the past 20

years," and "expenditures on corrections alone increased from \$9 billion in 1982 to more than \$50 billion today." H.R. Rep No. 110-140, pt. II, at 2 (2007). As explained by Rep. Sheila Jackson-Lee (D-TX), an original co-sponsor of the Act, Congress sought through The Second Chance Act to reduce "considerably government expenditures on warehousing prisoners." 153 Cong Rec. H13564, 13580 (daily ed., Nov. 13, 2007). This goal of reducing costs provides a powerful argument in favor of decreased prison terms for any offender who is unlikely to reoffend upon release. Put differently, it is an argument to end the practice of "warehousing" prisoners.

The vast majority of white-collar offenders pose little risk of recidivism. *See, e.g.*, Peter J. Henning, *Prior Good Works in the Age of Reasonableness*, 20 Fed. Sent. R. 187 (2008); Ellen S. Podger, *Throwing Away the Key*, 116 Yale L. J. P. P. 279 (2007). As a general matter, the shame and reputational damage resulting from conviction are sufficient to deter most white-collar offenders from subsequent criminal behavior. Moreover, in many cases, the offender's conviction will preclude him from achieving the status that was necessary to commit the underlying crime in the first place. Many white-collar offenders were able to commit their crimes only by virtue of their capacity as an officer or director of a public company or as a licensed professional. Upon their release from prison, such positions are no longer available to them. The earlier release of such "rehabilitated, middle-aged, non-violent offenders from an already overcrowded prison population can be a win-win situation for society," said Jackson-Lee. "It promises a reduction in burdens to the taxpayer, and an affirmation of the American value that no non-violent offender is beyond redemption." *See* 153 Cong Rec. H13564, 13580 (daily ed., Nov. 13, 2007).

## CONCLUSION

The Second Chance Act provides white-collar practitioners with a potential tool to combat the draconian sentences suggested by the Guidelines for economic crimes.

Practitioners should argue at sentencing that Congress has set a national policy of promoting early release and community confinement, and has endorsed the notion that age, rehabilitation and fiscal responsibility are all relevant to determining the appropriate length of incarceration. The message to judges is that the rigid, punitive, deterrence-based approach to white-collar sentencing should be discarded. This new perspective, framed in the terms of the ever-relevant sentencing factors set forth in 18 U.S.C. § 3553, may persuade some courts to craft the sort of individualized sentences that were abandoned under the Guidelines.