

# Companies House boosting enforcement action

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By Andrew Katzen

Directors' concerns include operational effectiveness, long-term strategy, leadership, stakeholder management and sometimes also share price.

Often overlooked amid all this, however, are the fundamental administrative obligations that if not properly attended to can have serious personal consequences.

Every year thousands of UK company directors are criminally prosecuted by Companies House for breaching their obligations under the Companies Act 2006.

The most common crime directors are prosecuted for is failing to submit accounts on time.

A convicted individual will receive a criminal record, may be fined and can, depending on the seriousness of the offence, be disqualified from acting as director for up to five years.

The Covid-19 pandemic saw a lull in prosecutorial activity by Companies House, but the consensus among specialist lawyers practising in this area is that this is changing rapidly.

As Companies House gets more proactive in enforcement it is incumbent on company directors and their advisers to know not only what their legal obligations are, but also what they should do if they find themselves under criminal investigation.

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## **The criminal offence of failing to file**

The Companies Act 2006 imposes criminal liability on directors for breaches of a variety of statutory responsibilities.

Arguably the most significant of these, and certainly the duty that the agency is most keen on enforcing, is the obligation to file annual company accounts on time.

Company accounts must be filed with Companies House within a set period following every financial year end. Most require audit, although the accounts of some small companies are exempt.

The precise period by which this must be done varies with the type, size and age of the company.

Criminal prosecution of directors who fail to file accounts on time can take place even if the delay was due to circumstances beyond a director's personal control.

It can also occur if the director does not normally get involved in the filing of accounts – something that may well be the case for the directors of multiple companies, or in very large organisations.

Companies House can also prosecute directors for the offence of failing to deliver confirmation statements, which are the documents that confirm the accuracy of information held by the agency. Often it will charge directors with the two offences simultaneously.

## **How active is Companies House in bringing prosecutions?**

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Companies House publishes annual enforcement data. The most recent set of statistics show that over the financial year 2021-22 the agency criminally charged 1,467 individual directors. Of these, 761 were convicted, making a conviction rate of 52 per cent.

Failing to deliver annual accounts was the most common charge. During the financial year 2021-22, the agency brought a total of 1,364 charges for this offence.

It brought 624 charges for failing to deliver confirmation statements over the same period.

Compared to preceding years, 2021-22 was relatively quiet for Companies House prosecutions, something that is likely due to the impact of the pandemic. It has been my experience, and that of colleagues working in this area, that this number has picked up significantly since then.

Over the eight years until 2019-22 (ie before the pandemic), the total number of directors summonsed to court stayed relatively steady at around 4,000 per year, with the conviction rate remaining equally steady at roughly 50 per cent.

## **The prosecutorial process**

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The evidence required by Companies House to bring a prosecution for failing to deliver annual company accounts is not particularly complex. All the agency needs to prove is:

- that the defendant was a director immediately before the end of the period to file the accounts;
- that the filing deadline has expired; and
- that Companies House did not receive the documents by that time.

If these three criteria are considered to be fulfilled, then the agency will usually send a warning letter or email to the director in question. This generally threatens enforcement action unless the missing accounts are delivered.

If the requested documentation is not forthcoming, then Companies House can strike the company off the register and/or prosecute by obtaining a summons ordering the director to attend Cardiff Magistrates' Court at a particular time and date.

On top of this, Companies House can also issue an administrative penalty either as an alternative or in addition to a prosecution once the accounts are delivered.

Individuals who have resigned their directorships by the time of the summons can still be prosecuted, as the liable director is the one who was in place immediately before the end of the period to file the accounts.

A convicted director is liable to an unlimited fine as well as a daily default fine for continued contravention.

Multiple convictions (including at the same hearing) can lead to disqualification proceedings, by which an individual may be banned from being a director of any UK company for up to five years.

## **Defences against Companies House prosecution**

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While Companies House offences may appear to be strict liability offences (ie those to which, if the criteria are met, there are no possible defences), this is not the case.

It is possible to successfully defend against the charge of failing to file company accounts on time by showing that the director "took all reasonable steps for securing that those requirements would be complied with before the end of that period".

In order to succeed with this defence the defendant must both raise it and prove it – this is in contrast to most other criminal prosecutions where the onus is on the prosecution to disprove a defence.

It is insufficient for an accused director to show they took 'some' or 'many' reasonable steps to ensure the accounts were filed on time. The legislation is explicit that they should show they took 'all' reasonable steps.

## **What to do when contacted by Companies House**

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Any director who is contacted by Companies House in relation to a criminal offence is advised not to ignore this communication.

Early, constructive engagement with the agency can prove crucial in establishing a defence and/or dissuading it from prosecuting. With the right approach this can be successful.

Anyone who receives a summons to court from Companies House will be required to either attend court personally, or through a lawyer or via correspondence.

They will need to indicate a plea. If this is 'not guilty' then a trial will be listed, and the director will have to attend and may give evidence and call witnesses.

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