

It pays to be on time

What are the consequences for directors who file company accounts late? Nick Scott and Christopher Colthart explain all

Under the Companies Act 2006 (CA 2006) it is a criminal offence for directors to file their company accounts late.

Typically, there isn't any leeway in whether accounts have been filed late or not; as soon as a company is late with its accounts the offence is committed, and directors are at risk of a criminal prosecution. The longer the failure to file goes on, the greater that risk becomes.

There can be many reasons why company directors fail to file their accounts on time; for example, there may be a shareholder dispute or some other issue delaying the preparation of the company's accounts. Unfortunately, for what may seem a relatively minor infraction, a conviction for late filing of accounts can have far-reaching consequences, including possible disqualification as a director, foreign travel restrictions and disciplinary action by relevant professional regulatory bodies.

The risk of prosecution

Late filing of accounts is a growing issue for companies and Companies House alike, with filing penalties for 2022-2023 in England and Wales said to have been circa £150 million for private companies.

Some directors may, rightly or wrongly, take the view that payment of a late filing penalty is an acceptable business cost versus the commercial benefit of extending the relevant filing deadline. However, Companies House is increasingly of the view that the relevant filing penalties are evidently not a sufficient deterrent to drive compliance with the filing obligations in the Companies Act.

Consequently, its approach to enforcement has become more aggressive, with prosecutions now much more common. For example, the number of charges laid in court for failing to file company accounts, jumped from 1,364 in 2021-22, with 730 convictions made, to 1,938 in 2023-24, with 1,169 convictions made. The days of just filing accounts late and expecting no further action are now long gone.

The sanctions

Directors convicted of a late filing offence (which becomes a spent conviction after 12 months in the UK) may have to declare the offence on foreign travel

applications, like the US ESTA or the EU equivalent, for years to come. Equally, repeated breaches of the filing obligation may lead the court to make a disqualification order against the director, under ss.3 or 5 of the Company Directors Disqualification Act 1986. Such an order would prevent the individual from being a company director (or even acting in a management role) for a specified period of time (up to a maximum of five years).

Further, for directors who are regulated professionals (e.g. FCA regulated individuals/accountants/lawyers), their professional rules will, in many cases, require them to self-report the fact of the conviction. This could lead to disciplinary action being taken against them, which could have significant professional, financial and/or personal repercussions.

Can directors reduce their risk?

The problem for directors is that the late filing offence is, in essence, a 'strict liability' offence. Broadly, that means that, unlike most criminal offences, the prosecution doesn't have to prove any particular state of mind on the part of the directors (e.g. intention or recklessness), only that they didn't file the accounts on time, which isn't a very high bar.

Nevertheless, under s.451 (2) CA 2006, there is a statutory defence to the allegation, which involves directors proving that they did everything they reasonably could to file the accounts on time. Reliance on this defence typically results in significant fact-gathering and presentation exercises.

Companies House is typically more receptive to explanations involving issues that are not entirely in the directors' control, such as difficulties in the preparation of accounts where there has been a group restructuring and the accounts of the subsidiaries have been found to be deficient in some way.

Note that the statutory defence under section 451 CA 2006 involves a reversal of the burden of proof, whereby the onus falls on the director to prove (on the balance of probabilities) that all reasonable steps were taken to file the accounts on time.

There is case law in relation to other statutes with a reverse burden of proof which suggests that this reversal of the burden may not be ECHR compliant. Were that held to be the case (this point remains open on the authorities in relation to s.451 CA 2006), then the provision must be 'read down' in accordance with s. 3 of the Human Rights Act 1998. The effect of that is that the accused only needs to adduce some evidence in support of their defence, at which point the burden shifts back to the prosecution to disprove the defence to the criminal standard in the normal way.

There is a further possible defence to a late filing allegation under section 1157 CA 2006. This provides that even if a breach of duty by a director can technically be made out, the court still has the discretion to acquit if satisfied

that the director acted honestly and reasonably, and that, having regard to all the circumstances of the case (including those connected with [the director's] appointment) he/she ought fairly to be excused.

The defence in s.1157 CA 2006 is, on the face of it, more promising to a director than the statutory defence in section 451 CA 2006, as it invites the court to assess whether that director acted "honestly and reasonably... having regard to all the circumstances of the case...".

Now, it might be asked how you could have acted "honestly and reasonably" but have failed to take "all reasonable steps". Yet, the authorities do appear to indicate that the s.1157 CA 2006 defence is (a) available, in principle, in addition to the s.451 CA 2006 defence, but also (b) a lower bar than the s. 451 CA 2006 defence's "*all reasonable steps*" (emphasis added). These propositions are yet to be tested by the higher courts but are very arguable, at least.

As a result, these defences, whatever the precise facts of each case, are well worth considering in any defence of a late filing prosecution.

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