

Baker Hughes: Exclusive Insight into the Investigative Process



John Upton is Legal Counsel – Audits and Investigations for Baker Hughes, a leading Global Oilfield Services Company. John's role is to carry out FCPA audits and internal investigations on a world – wide basis. He is a barrister who has previously worked in private practice and as an Enforcement lawyer in Several Government Departments and for the Financial Services Authority. He holds degrees from the University of Oxford and the London School of Economics.

In this Legal IQ interview, John shares his views on how to overcome the common pitfalls of an internal investigation, what the best tips for cutting investigation costs are and the most effective strategies your company can have in place before, after and during an internal or external investigation.

Maya Fowell In your opinion, how are corporates coping with recent investigative developments? How should they be reacting?

John Upton Corporates are reacting on the whole well with recent investigative developments, which is to say they're becoming more aware of the requirements and the resourcing needs that one has to fulfil to perform a successful internal investigation. How should they be reacting? The answer to that is, they should be reacting appropriately and reacting quickly if they think that they have an investigative issue.

MF Do you think people are reacting differently in 2015 compared to 2014?

JU I think what is happening is that regulators and law enforcement bodies are beginning to give more information and more indications of how new developments may be applied. In the UK we have the Bribery Act and we've had the first individual

prosecutions under that act, so we're beginning to see at least the developments of jurisprudence on the Bribery Act. We also have an indication that the first invitations for DPAs have gone out and again that shows us a level of activity that the SFO are carrying out. In that sense it's more of the same for corporates in terms of they should be expecting more internal investigation activity and more interaction with law enforcement authorities.

In terms on the US side, again, the DHA has been still pursuing its course but we have the very interesting recent development with BHP Billiton and the SEC fine there, and clearly that signals a message where, even without a finding of bribery there are systems and controls issues that need to be addressed. So the focus still has to be kept up by corporates in response to the activities of law enforcement agencies.

MF What are the common pitfalls of an internal investigation? Can you tell me about two?

JU Two common pitfalls of conducting internal investigation, one is timing – how long it takes to get an internal investigation done and the big difficulty can be that there can be some significant slippage in the time scale for an internal investigation. Everyone sets off with the best of intentions of getting this done in as quick a time as possible, but events intervene and priorities change, and there is a loss of focus. The timeline can stretch out to way beyond where it was ever envisaged in the first place.

The second pitfall is scope, and what I mean by that is either the scope being set too narrow – artificially narrow – or else being set far too ambitiously wide. In both of those cases, you will fail to address the problem that you need to get to.

MF What can be done to overcome the issues of timing and scope?

JU In both of those cases, planning and control are the key. Having a tight team that runs the investigation is important but having a schedule that one tries to at least keep to (a timetable with milestone reviews) is going to be extremely useful in project managing an investigation. This is assuming it's quite a complex and multidisciplinary, multijurisdictional investigation, and clearly the bigger the investigation the more difficult it is to project manage. So really to front load the preparation is the key to it and to have milestone reviews so that one can make sure that it's on track and if it's not, to bring it back on track. In the other direction, if there are other lines of inquiry that come up that they can be pursued if necessary and appropriate. I

would say that is the solution really for controlling scope and timing difficulties.

MF What are the latest red flags that companies should be looking out for?

JU There are a number of red flags that continue to apply and be appropriate, but there are also newer ones, as we move into emerging markets and have more contact with third parties in large corporates who are dealing with local content issues or with visa issues for us or being business on our behalf. I think it is important to be aware of the difficulties of controlling and understanding a relationship which is more at arm's length. The difficulty there is that with certain companies, with certain agents, the invoicing may not be as one might wish it to be – say, for example, lump sum invoicing or odd descriptions on invoices or emergency payments, that type of thing. Those are red flags. I would say in the area of third party relationships we have to be very aware of some of the difficulties, not only in that issues can arise but also in how we then get to investigate those issues because that can be extremely difficult as well.

MF How can company's best determine a single point of contact to oversee all internal investigative matters?

JU There has to be an investigations protocol in operations. There needs to be a predetermined plan of action so that you know where that investigation is going to sit in terms of who is to have the responsibility for it. One of the ways that you can best deal with that is by having an investigations matrix.

So, depending upon the type of misconduct or alleged misconduct that is being committed, that will then go to a designated part of the organisation; that's assuming you have quite a large, complex organisation with different bodies dealing with different types of misconduct. I would say that it's important to have an investigations protocol in place, no matter what the size or your organisation. If it's small then it's going to be relatively more straightforward to always have them coming in to a single point of administrative contact who can then deal with the issue from the outset. Otherwise, if it's a more complex organisation then an investigations matrix seems to work well and also to have good lines of communication open between the various bodies which may get involved in performing investigation. I think the combination of those should lead to an effective determination of who gets to deal with the investigation.

MF What is the importance of an independent investigating officer?

JU There are two ways of looking at independence and one is someone being internally independent and then there is the other way of looking at it, which is that you have an external investigator to come in, usually external counsel. In terms of internal investigations I think it's still very important if you have the resources to have an independent investigations function. In my firm we do have an investigations counsel who sit separately from other functions; they report in to litigation or compliance and they have a real measure of independence.

It's extremely important; even if you don't have the luxury of that, you must make sure that the person investigating doesn't have an interest or a perceived interest of any sort in the matter under investigation. I would say that it's crucial to have an investigator who has independence, and it's just determining the measure of independence that you want, ranging from internal measures of independence to having external counsel look at it.

MF In your opinion, what are the most significant matters to consider when trying to pre-empt an external investigation?

JU I wouldn't say that my primary aim in when I'm in the investigations counsel would ever be to pre-empt. It would nearly always to be and try and do a thorough and correct job, but there are things that come out of doing that job which may mean that an external investigation becomes less necessary. I guess I've addressed those in a way in my answer about pitfalls so going back to that, one is that really you conduct an efficient investigation and that you don't artificially exclude matters that should be in scope and on the other hand, you don't conduct an investigation which is so huge that it begins to look at absolutely everything that's ever gone wrong in a business -I'm exaggerating but you know what I mean.

It's important that you conduct a realistic and thorough investigation and that you don't artificially limit the scope and on the other hand, that you don't make the investigation ineffective so if an external regulator or law enforcement body were to come

and look at your work, by it being such a large scatter gun investigation that you've wasted your resources and you haven't had any focus. So really it's to address the issues realistically, to not limit the investigation so that you don't really look at the proper issues and to not expand it so widely that you dilute its focus.

MF Budgeting for an investigation is not an easy task, as they can be incredibly expensive. What are your tips for controlling costs?

JU They can be expensive, planning and review are the key to this. First of all, plan as much as you can. You may discover things along the way, which means you have to extend the scope, but you should have an initial plan which will have an estimate of, given the allegations that you're looking at, what resources you may need to use. Use milestone reviews to keep a cap on budget so that you can see what resources you're using and how they are being deployed. There's a step change when you involve external counsel; there it's very important to manage that relationship effectively. Internally you can manage it most effectively but if you have to use external resources then it is really important, A, that you negotiate at the time of use that you get the best deal for yourself as general counsel, as compliance counsel, and then to keep a check on what the external counsel is doing.

It's a partnership, and the other thing to consider is, can they leverage off your internal resources rather than them going to another third party firm, for example, of forensic auditors? Do you have that capability in-house that can be utilised by the external counsel? So

it's really planning and it's continuous review, as well as keeping – if you go external – a dialogue open and not being afraid to question whether that's necessary; you know, is that piece of expenditure really necessary? Do we have to do this? You have to run an effective investigation and depending upon how serious it is, it is going to cost money, but there are definitely techniques that you can use to at least keep a check on the budget that you're using.

MF Can you share three tips companies can use to ensure issues do not get escalated to an external investigation?

JU The first one may sound obvious; its prevention is better than cure. So, let's be sure that we're running a good compliance programme, we've got that in place, that we're training and communicating, that we minimise the opportunities for misconduct. Obviously, it's better that something doesn't get committed than it has to get investigated.

The second thing I would say is, don't hide things; that is a recipe for escalation if you are hiding things in investigations or deliberately ignoring – raising the telescope to Nelson's blind eye rather than the good eye in the investigation sense.

Thirdly, is managing employees because one part of the skill of an internal investigation is the diplomatic and political skill to, whilst doing your thorough job absolutely correctly and with integrity, that you manage the expectations and the reactions of employees. The soft skills of doing that with employees are an important part of the piece as well. It's not a pleasant matter to

investigate; you have to do your job thoroughly and rigorously but you can do it to minimise disruption.

You also have to define the scope correctly and bring it in on time and appropriately. I think the combination of those three tips will assist in minimising a need for an escalation, for it becoming external.

MF What advice would you give a company that is about to begin an internal investigation?

JU Well, my advice is to make sure before you've got to this point that you have a structure for the investigation, that you can control that structure that you understand the structure and how it all fits together. I think the worst thing you can do is go off on an investigative frolic and not have an understanding of reporting lines, responsibilities, planning and scope. It is really important that you've

thought through the way an investigation would work before you run it.

Once you've run a number of investigations then it's in the system and you're developing the institutional reflexes and the institutional pathways so that people understand it. But if you're not used to running them and you have to deal with one or else you've only done a small one and suddenly a big one comes up, then the importance is to have clearly defined roles and protocols in place. In the fog of war things can get very difficult, so you have to be able to have reference points and to understand how things will roll out and play out. Therefore, planning and a structure beforehand are absolutely vital. Along with that, in the practicalities of things is, you are prepared for the cost and have the techniques we've discussed to try and minimise cost.

Global investigations are rapidly escalating. It's a fact.

Approximately 25 percent of corporates believe the number of legal disputes their company will face in the next 12 months will increase. These trends have a real-world impact on the way companies will interact with the marketplace and with each other.

The timing for IQPC's 3rd [Global Investigations Summit](#) (GIS) could not therefore be better. Building on its success previous years, GIS will take place in London on October 6th - 8th, 2015.

For information download our [agenda](#).

GLOBAL INVESTIGATIONS SUMMIT



John Upton Legal Counsel (Audits and Investigations) **Baker Hughes**

Conference Day One

3:30 PM [What is the new best practice in ensuring a culture of integrity sticks?](#)

The issue of whether company policy is filtering down into staff behavior at all levels is a huge and consistent theme across many organisations. The banks thought they had cleaned up their acts, until they were faced with the FX scheme, and they are not the only industry to be battling against engrained staff practices that put the company at risk. Our panel will discuss where the real problems lie, and potential solutions, including but not limited to:

- Recruitment and development programmes
- New digital training methods
- Communications approaches
- Compliance programmes: management led or ground level?
- Identifying and dealing with managers and top performers who feel they are immune to the rules