

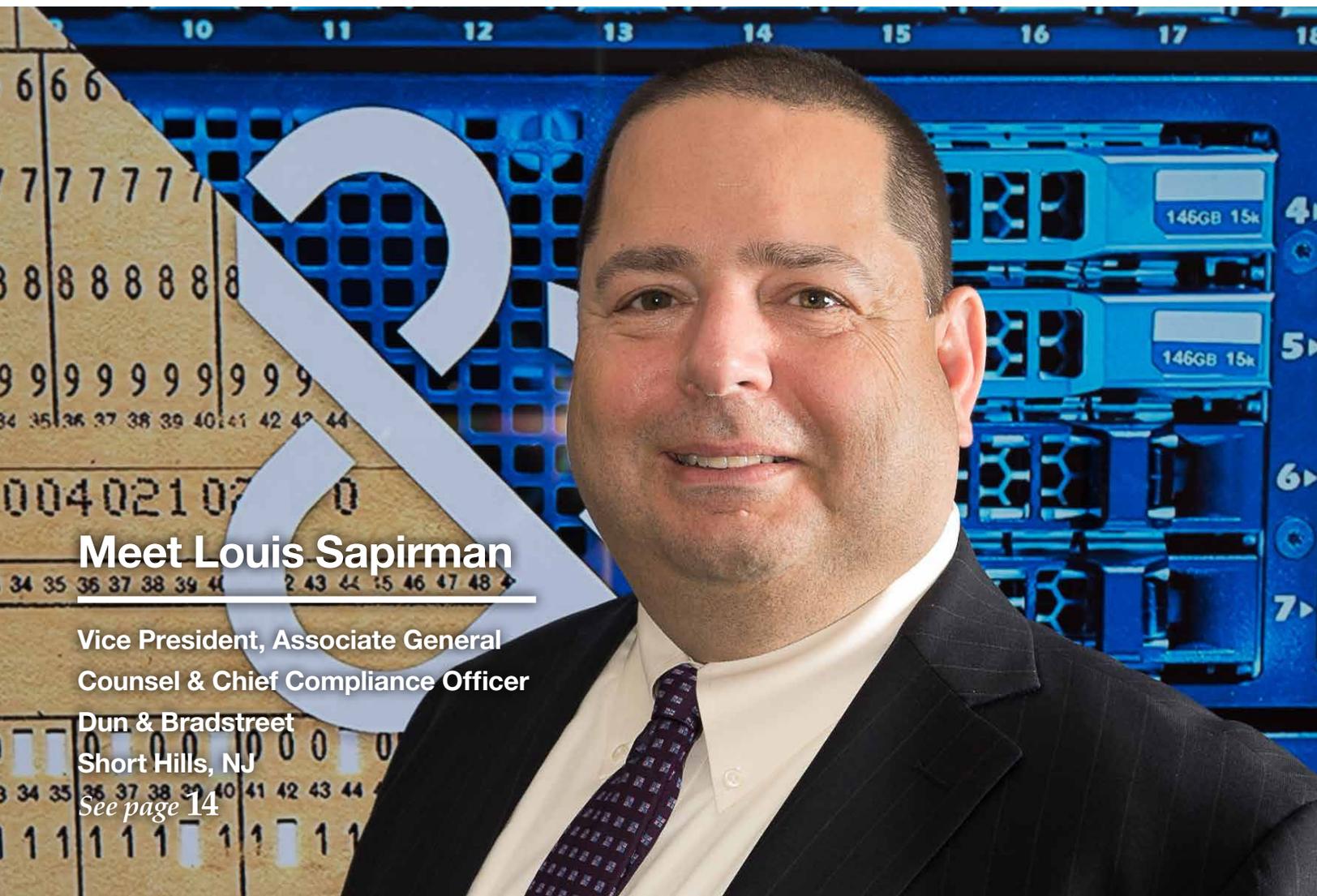
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Meet Louis Sapirman

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See page 14

27

The critical
role of effective
communication
in compliance

Bill Dee

31

What ethics
and compliance
professionals can learn
from the EEOC

Tucker Miller

35

Inside the prosecutor's
playbook: Assessing
the FCPA enforcement
pilot program

Peter Anderson

43

A new anti-bribery
management
systems standard:
ISO 37001

Leslie Benton

by Jeffrey M. Kaplan

Celebrating the Sentencing Guidelines

November 1 of this year will mark the 25th anniversary of the advent of the Federal Sentencing Guidelines for Organizations, which—more than any other legal development in the U.S.—gave birth to what some would say is an “Age of Compliance.”



Kaplan

It is worth taking note on this “silver anniversary” that the Guidelines approach to corporate law enforcement was initially considered “developmental,” as the then Chair of the Sentencing Commission put it.¹ By “Guidelines approach,” I mean the notion of government providing businesses with incentives for C&E programs and direction on how to make such programs effective. Both of these were largely new and controversial at the time.

This idea has since spread throughout the world. It has done so principally through laws addressed to preventing corruption. To a lesser extent, certain other legal standards—particularly those promoting fair competition—contributed to the spread of the Guidelines approach. But, looking at the “cup” from the other side, there is still a long way to go before its acceptance is truly universal.

What is the source of the resistance to what seems—at least to C&E professionals—like basic common sense? Perhaps it has to do with incentives for those charged with enforcement. That is, the professional benefits that tend to flow to a prosecutor from securing a “mega fine” from a

prominent corporation are substantial, whereas the incentives for helping to prevent a crime from occurring in the first place are not.

Additionally, some government officials and business leaders seem to question whether rigorous C&E programs are truly necessary, because—in their view—business crime is almost always the fault of those with indelibly bad characters who will circumvent any C&E controls. Fortunately, in the past 25 years, a body of social science known as “behavioral ethics” has developed which powerfully rebuts this notion.

Finally, in thinking about whether the Guidelines approach works in practice as well as theory, one might posit a “counterfactual” world—where there was little or no C&E training, protection of whistleblowers, or effort of any kind by companies to prevent its employees and agents from engaging in corruption, bid rigging, or fraud—and ask if this world is preferable to the one we have. Indeed, one doesn’t have to strain one’s imagination to picture these counterfactual possibilities: They are the way things used to be before the Guidelines, at least in many companies. *

1. The Honorable William W. Wilkins, Jr. in Kaplan & Murphy, Compliance Programs and the Sentencing Guidelines (Thomson Reuters). Available at <http://bit.ly/cps-guide>.

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