

ASK THE FORMER REGULATOR

Expert Analysis

# Martin Act Investigatory Tools—An Overview

By Erica F. Buckley

December 6, 2024

**Q**uestion: I am a real estate sponsor and I just received notice from the New York Attorney General about a Martin Act investigation into my project. What does this mean and should I be concerned?

**A**nswer: The short answer to your question is yes, you should be concerned. The New York Attorney General (NYAG) has broad and nearly unparalleled investigatory power under multiple state laws, including the Martin Act. The NYAG recently made national headlines for its investigation into President-elect Donald Trump under New York's Executive Law. The NYAG has similar powers — both civil and criminal — under the Martin Act. Here are some things you need to consider.

## The Attorney General's Broad Investigatory Powers Under the Martin Act

The Martin Act, codified as Article 23-A of the New York General Business Law, grants the NYAG extensive powers to investigate and combat securities fraud. Enacted in 1921, the Martin Act is one of the most potent tools available to any state regulator in the United States. It allows the NYAG to investigate, subpoena documents and testimony, and take legal action against fraudulent practices in the securities market.

In 1960, the Martin Act was amended to add Section 352-e, which regulates the offer and sale of real estate securities, which include both investments in real estate (syndication) and cooperative interests in realty (coops, condos, timeshares, homeowners' associations, and seniors entry-fee communities). This article explores the broad investigatory powers under the Martin Act, seminal cases that have shaped its application, and parallels with the investigatory powers under New York Executive Law §63(12).

## Subpoena Power and Confidential Investigations

Under the Martin Act, the NYAG has the authority to subpoena witnesses, compel their attendance, and

require the production of relevant documents. New York General Business Law §352 outlines these powers, allowing the NYAG to investigate any fraudulent practices related to securities and commodities, which as noted above includes real estate securities under New York General Business Law §352-e. The NYAG can initiate an investigation based on a complaint or on their own initiative if they believe it is in the public interest.

The investigatory process under the Martin Act is highly confidential. Witnesses and officers participating in the inquiry are prohibited from disclosing any information obtained during the investigation, except as directed by the NYAG. See *Goidel v. Lefkowitz*, N.Y.L.J. (April 9, 1979). The NYAG takes the position that this confidentiality is crucial for protecting the integrity of the investigation and preventing the potential tampering of evidence or witness testimony. Subdivision 5 of §352 criminalizes improper disclosure of an NYAG investigation as a misdemeanor.

## Right to Counsel and Transcripts

The right to counsel during Martin Act investigations is limited. In *Kanterman v. Attorney General*, 76 Misc.2d 743 (Sup. Ct. N.Y. Cnty. 1973), the court held that witnesses subpoenaed under the Martin Act do not have a constitutional right to the assistance of counsel during the investigatory hearings. While witnesses may have their attorneys present, the attorneys' participation is restricted to advising their clients on their constitutional rights, such as the privilege against self-incrimination.

Regarding transcripts, witnesses do not have an automatic right to obtain a transcript of their testimony during the investigation. In *Gutterman v. Lefkowitz*, 92 Misc.2d 583 (Sup. Ct. N.Y. Cnty. 1977), the court ruled that a witness could not make a tape recording of their testimony or have it transcribed by a certified court reporter. Similarly,



Erica F. Buckley

ERICA F. BUCKLEY is the former Chief of the Real Estate Finance Bureau. She leads Nixon Peabody's Cooperatives & Condominiums and State Attorneys General practices. This column is for informational purposes only and is not a substitute for agency guidance.

in *Abrams v. Alliance for Progress, Inc.*, 136 Misc.2d 1022 (Sup. Ct. N.Y. Cnty. 1987), the court denied the witnesses' request to condition their compliance with subpoenas on receiving transcripts of their testimony, emphasizing the investigatory nature of the examination.

It should be noted, that for the first time in my 20 years of dealing with the NYAG both as an assistant attorney general and an attorney representing clients during investigations, I recently learned that the office has implemented a new policy of allowing counsel to review a transcript after testimony to create an errata sheet.

### Standard for Issuing Subpoenas

The NYAG's standard for issuing subpoenas under the Martin Act is relatively low. The NYAG only needs to show that the testimony or documents sought are "material and necessary" to the investigation. This standard was affirmed in *Gonkjur Assocs. v. Abrams*, 88 A.D.2d 854 (1st Dep't 1982), *aff'd*, 58 N.Y.2d 878 (1983), where the court upheld the NYAG's broad investigatory powers, allowing the issuance of subpoenas based on the NYAG's belief that further investigation was warranted.

### Commencing an "ex-parte" Public Investigation

The ultimate weapon at the NYAG's disposal is the public investigation. New York General Business Law §354 allows the NYAG to commence an ex-parte public investigation by obtaining a court order. This section provides the NYAG with the authority to conduct public hearings and issue preliminary injunctions to prevent ongoing or imminent fraudulent activities. The NYAG must demonstrate a "reasonable basis" for investigating whether a violation of the Martin Act has occurred or is about to occur. See *James v. Ifinex, Inc.*, 2019 N.Y. Slip Op. 32454(U) (Sup. Ct. N.Y. Cnty. 2019), *aff'd*, 185 A.D.3d 22 (1st Dep't 2020). The court is then obligated to grant the order, specifying the time and place for the witnesses to appear and testify.

### Parallels with New York Executive Law §63(12)

The investigatory powers under the Martin Act are mirrored in New York Executive Law §63(12), which grants the NYAG similar authority to investigate and prosecute fraudulent or illegal business practices. This statute allows the NYAG to seek injunctions, restitution, and other relief in cases of repeated or persistent fraud. The First Department, Appellate Division, is presently considering the scope of §63(12) in the pending appeal of *People v. Trump*, 2023 NY Slip Op 33314(U) (Sup. Ct. N.Y. Cnty. Sept. 26, 2023).

The Trump investigation highlights NYAG's ability to issue subpoenas and compel testimony and documents from high-profile individuals and entities. The NYAG's office conducted a thorough investigation, involving interviews with numerous witnesses and the review of millions of pages of documents. Notably, footnote 3 of the Memorandum of Law

in Opposition filed Oct. 26, 2022, in *People v. Trump*, Sup. Ct. N.Y. Cnty. Case No. 452564/2022, NYSCEF No. 126, indicates the Trump parties "have not been provided with any of the complete deposition transcripts nor the 'millions of pages' of documents." Under its broad powers, and relying on *Guterman* and *Abrams*, the NYAG does not share documents with parties during their investigations.

Looking at the legislative history of Executive Law §63(12), the original intent behind the broad sweeping powers granted to the NYAG was to "enjoin the continuation in business as partners or under a trade style name of persons who are guilty of repeated fraud or illegality." See Sponsor Memorandum, Bill Jacket, L. 1956 Ch. 592. The bill jacket includes a letter from Governor Harriman's Consumer Counsel pointing to an underlying criminal conviction as the basis for the NYAG's use of the statute.

Of note also is that the New York State Bar Association and the New York State Comptroller disapproved the bill as granting to the NYAG too much power and for failing to clearly define what fraud or illegality means. Regardless, the bill passed. This is relevant here because for an investigation under the Martin Act involving real estate, the questioner should remember that the NYAG also has the Executive Law at their disposal, and in almost every real estate investigation I have been involved with, the NYAG relies on not only the Martin Act, but the Executive Law as well to conduct their investigation, issue subpoenas, and commence litigation—which arguably gives to the NYAG even more power than the Martin Act.

### Conclusion

The Martin Act provides the NYAG with formidable tools to investigate and combat fraud. The NYAG's broad investigatory powers, including the ability to issue subpoenas, conduct confidential investigations, and commence public investigations were bestowed upon the office to ensure the integrity of the securities market and to protect the public from fraudulent practices, especially those that could not defend themselves. This is especially so as there is no private right of action under the Martin Act.

Furthermore, seminal cases have affirmed these powers, emphasizing the NYAG's role in safeguarding the public interest. And if an investigation takes a turn and doesn't result in a violation of the Martin Act, the NYAG can pivot to using the Executive Law if the office finds other types of wrongdoing. By way of example, the Trump investigation (and litigation) should reinforce the need to take any inquiry from the office very seriously, because as the world has seen, the NYAG possesses some of the broadest powers of any Attorney General in the United States. Therefore, to my questioner, please take this inquiry very seriously and lawyer up. You will need it.