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Manhattan District Attorney Promises Broader Use of the Martin Act in Combating Financial Fraud and Vows to Fight for Tougher Penalties

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In his first speech at the New York City Bar Association since his election, Manhattan District Attorney Cyrus R. Vance, Jr. said that he would expand his office's use of the Martin Act, New York's securities fraud statute, in targeting financial fraud, and that he would lobby lawmakers to toughen penalties under the measure and to extend the statute of limitations.

"The Martin Act has never been more relevant," Vance said. "In recent years, our entire nation has become painfully aware of the devastating toll on our economy that results when widespread mistrust infects financial markets."

The Martin Act (the Act), enacted in 1921, grants New York prosecutors broad subpoena power and authority to investigate and prosecute "all deceitful practices contrary to the plain rules of common decency." *People v. Federated Radio Corp.*, 244 N.Y. 33 (1926). The Act allows prosecutors to choose between a civil or criminal investigation. More importantly, unlike federal securities laws, it is easier to prove, exposing securities sellers to liability regardless of whether they intended or willfully decided to commit misconduct. To violate the law, no sale or purchase is necessary if there are lies or deception in the offering of securities; nor is intent to defraud required—even in criminal cases. *Id.* at 38. ("[T]he words 'fraud' and 'fraudulent practices' should . . . be given a wide meaning so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law.").

Many view the state law as one of the most powerful prosecutorial tools in the country because it gives state prosecutors broad powers to subpoena documents from any company doing business in New York, but its many critics describe the Act as overreaching and outdated and criticize what they see as its overuse by the Manhattan District Attorney's Office.

The Act saw a renewal in significance as a law enforcement and regulatory tool in the 1990s under successive New York attorneys general, including Eliot Spitzer and Andrew Cuomo, who used it against investment banks, broker-dealers, and the mutual fund industry. Robert Morgenthau, Vance's predecessor as Manhattan District Attorney, used the law to prosecute white collar crime.

Vance said he plans to make broader use of the Martin Act to prosecute investment frauds and Ponzi schemes involving investment funds, as well as investment schemes that use privately held companies.

According to Vance, his office also will use the Act to combat fraud schemes that target broker-dealers, the manipulation of commodities and commodities futures, and insider trading in securities and commodities.

Vance suggested that when it comes to punishments for white collar crime, the statute is outdated and too lenient. Under the Act, the highest-level crime carries no minimum term of imprisonment regardless of whether the amount of the loss is hundreds of dollars to an individual or hundreds of millions of dollars to the investing public. In either case, a state court judge "would be authorized to impose a non-incarceratory sentence," Vance said in the speech.

Vance said he wants penalties to conform to state larceny statutes, which distinguish among $1,000, $3,000, $50,000, and $1 million thefts or losses. Under Vance's proposal, a small-time broker who defrauds his customer of $2,000 would be subject to a maximum of 1 ⅓ years' to 4 years' imprisonment, whereas a shrewd manipulator or perpetrator of a large-scale accounting fraud would be subject to a mandatory minimum prison term of 1 year to 3 years. Each could face a maximum prison term of 8 ⅓ years to 25 years.

Additionally, Vance said, he will urge legislators to lengthen the time allowed to bring criminal charges for Martin Act violations, which is currently six years from discovery or ability to discover the fraud with reasonable diligence.

Vance also referenced his office's recently implemented guidelines regarding the prosecution of corporations (see our June 2, 2010 LawFlash at http://www.morganlewis.com/pubs/WC_CriminalChargesGuidelines_LF_02jun10.pdf) in urging corporations to self-report when they run afoul of the law. Vance acknowledged that he cannot guarantee the outcome of voluntary disclosure, but assured "a fair shake," adding that such disclosures are "very relevant" in his office's charging decisions.

Vance also said his office expects to bring more cases in partnership with the U.S. Securities and Exchange Commission, the Commodities Futures Trading Commission, the Financial Industry Regulatory Authority, the Federal Reserve Bank of New York, and the Depository Trust & Clearing Corporation.

The author of this LawFlash, Martha B. Stolley, was an Assistant District Attorney at the Manhattan D.A.'s Office for eight years, from 1998 through 2006. Additionally, there are several partners in Morgan Lewis's New York office with lengthy tenures in supervisory positions at both the Southern and the Eastern Districts of New York U.S. Attorney's Offices.

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