cyberlaw: **the brave new e-world**

By Anne F. Downey

Cyber Aspects of the New York Non-Profit Revitalization Act

I spent last spring, summer and fall working seven days a week on updating bylaws and conflict of interest policies for New York non-profits. Many clients also need an updated whistleblower policy and/or amendments to their Certificates of Incorporation. The triggering event that unleashed this tidal wave of work was the New York Non-Profit Revitalization Act of 2013, which took effect on July 1, 2014.

This column focuses on cyberlaw issues, and I promise that this month's column will address those issues. But before we turn to the cyberlaw aspects of the Act, let's quickly review the highlights of the new law.

When Governor Cuomo signed the Revitalization Act into law on December 18, 2013, New York non-profit corporations became subject to the most substantial revision of the New York Not-for-Profit Corporation Law in over 40 years. The Act streamlined and modernized many provisions of existing law. For example, certain real property transactions that formerly required the approval of two-thirds of board members can now be approved by a majority vote. Also, the process for obtaining approval for major corporate changes, such as mergers and amendments was simplified.

Most significantly, the Act imposes on non-profits a number of substantial governance-related requirements, many of which are also applicable to charitable trusts. These requirements include the following:

Adoption of a conflict of interest policy: While many non-profits have conflict of interest policies already in place, these policies may need to be revised in order to conform to the specific provisions mandated by the Act.

Adoption of a whistleblower policy: All New York non-profits with 20 or more employees and revenue in excess of $1 million must adopt a whistleblower policy containing specific provisions mandated by the Act, and the policy must be distributed to all directors, officers, employees and those volunteers who provide substantial services.

New audit requirements for certain New York non-profits: Those New York non-profits required to file an independent certified public accountant's audit review or report with the New York Charities Bureau must now follow certain procedures in handling audit issues.

Independent directors: A lot of heartburn has been triggered by the Act's mandate that all New York non-profits utilize "independent directors," as defined in the Act, to handle conflict of interest matters, whistleblower policy matters and audit matters. Many non-profits are facing challenging issues as they restructure in order to come up with at least three independent directors.

Board chair restriction: Effective January 1, 2016, no employee of a non-profit may serve as the board chair or hold any other title with similar responsibilities.

Regarding cyber issues, the Revitalization Act brings about a number of changes.

Under the Act, directors may participate in board and committee meetings by "electronic video screen communication" (e.g., Skype) so long as all persons participating can hear each other and each director can participate in the matters before the board or committee. Some have argued that existing law permitted attendance at a board meeting by Skype, but the Act makes clear that such participation is allowed unless otherwise provided in the certificate of incorporation or bylaws.

Also, the Act allows non-profits to use fax and email communications for certain matters. Concerning waiver of a notice of a member meeting or board meeting, the waiver may be transmitted in writing or electronically. If written, the waiver must be executed by the member or director signing the waiver or causing his or her signature to be affixed to the waiver by any reasonable means including but not limited to facsimile signature. If electronic, the transmission of the waiver must be sent by electronic mail and set forth, or be submitted with, information from which it can reasonably be determined that the transmission was authorized by the member or director.

Regarding a unanimous written consent of the members, the board, or a board committee, the consent may be written or electronic (unless the certificate of incorporation or bylaws specify otherwise). If written, the consent must be executed by the member or director by signing the consent or causing his or her signature to be affixed to the consent by any reasonable means

continued on page 10

CALLING ALL JUDGES, AGAIN!

Thanks to our blizzard, the Young Lawyers Committee's Evening with the Judiciary had to be postponed. The new date for the event is **Wednesday, January 28** from 5:00 – 7:00 p.m. at Templeton Landing.

The event is FREE to all members of the bench. And it is a priceless opportunity for newer attorneys to interact with the judiciary. Please contact YLC Chair Liz Midgley (emidgley@anspachlaw.com or 856-5012) to RSVP by January 23. We hope to see you there!

lost in (techno) space

By Martha Buyer

Caveat Emptor

One of my clients recently received a form letter from a well-known major provider of telecommunications services. The client, who is telecom savvy, sent it over for me to review. When I did (how much time can it take to read a four-page form letter, I thought?), I almost blew a gasket. While I was happy to oblige and review the document, I had no idea what I'd find buried in the tiniest font I've ever seen (think phone book and then go down two sizes). That alone caught my attention. Add that to the fact that the letter was unsigned and without a contact phone number, and I was concerned. The good news is that the client does very little business with this particular provider. But for other clients, as well as other entities that rely on this company heavily for other **intrastate** services, what's contained in this letter is worth noting, although truthfully, it may be too late to take any easy remedial action. Most **interstate** services (under the FCC's purview) were detariffed 14 years ago, which is why these tactics are not new in that portion of the telecom world. In any case, this latest salvo is a good reminder of the well-worn adage of *caveat emptor*.

The service provider's letter begins with an acknowledgment that there were changes to the New York Telecommunications laws that allow providers of services in New York to no longer rely on state-filed tariffs for some (and the word "some" is important) intrastate services that these companies provide within New York. Most enterprise consumers may not even be aware that some of these services were governed by tariffs that have been on file with the New York Public Service Commission, and the regulatory change doesn't really affect most of the major services that are considered intrastate service, including, among others, residential and individual business access line, including any usage bundled in this charge, access to emergency services, operator assistance services (local); and directory listings (main listing), including non-published service. (A complete listing of those services that are NOT affected by these changes can be found on the Public Service Commission's website – search for basic telecommunications services.)

So if most services aren't impacted by this change, why am I concerned? Because of the language contained in the terms of the accompanying Business Service Agreement. This is the two-page document with the tiny type. And buried in it are some real contractual doozies (yes, that's a technical term).

My personal favorite is in the preamble. A bit of explanation first. The words "tariffs," "guidebooks" and "service guides" refer to documents that the provider has posted on its web pages. The provider defines "guidebooks" as "those documents that contain the standard descriptions, pricing and other terms and conditions for services that were, but no longer are, filed with regulatory commissions." "Service guides" are defined as "documents that contain the description, prices, and other terms and conditions for services that are not contained in a guidebook or a tariff." In English, that's everything else. Sort of.

What the provider fails to mention in this agreement - or anywhere else - is that unless you're willing to spend hours figuring out which documents and terms apply to the contracted services, it's highly unlikely that even the savviest customer will ever find the right document. Nonetheless, these documents do exist. The challenge is finding the right ones and the relevant sections. But that's another matter. The relevant language is so good that I'm going to quote it here:

> *You agree that it is impractical for [the Provider] to provide here all of the terms and conditions, including rates and charges that are set forth under those documents and that [the Provider] has acted reasonably in providing access to the Tariffs, Guidebooks and Service Guides as described in Section 1.*

Impractical?! Impractical?! As I read this, that means that in the tiniest possible print, the provider has told its New York customers (and presumably others as well), that whatever the terms of the agreement

continued on page 12

Cyberlaw continued from page 9

including but not limited to facsimile signature. If electronic, the transmission of the consent must be sent by electronic mail and set forth, or be submitted with, information from which it can reasonably be determined that the transmission was authorized by the member or director.

Concerning a members meeting, a notice of meeting must be given personally, by mail, by fax or by email to each member entitled to vote at the meeting, not less than ten nor more than fifty days before the meeting. If sent by fax or email, notice is given when directed to the member's fax number or email address as it appears in the corporation's records. A corporation cannot rely upon giving notice of a members meeting by fax or email if the corporation is unable to deliver two consecutive notices to the member by fax or email or otherwise becomes aware that notice cannot be so delivered to the member. Whenever a corporation has more than 500 members, the notice may be served by publication in a newspaper published in the county in which the principal office of the corporation is located, once a week for three successive weeks preceding the date of the meeting, provided that the corporation shall also prominently post notice of such meeting on the homepage of any website maintained by the corporation continuously from the date of publication through the date of the meeting. A corporation must send notice of meetings by first class mail to any member who requests in writing that notices be delivered by such method.

In addition, a member may authorize another person or persons to act for the member as proxy by providing such authorization by email to the person who will be the holder of the proxy or to a proxy solicitation firm, proxy support service organization or like agent duly authorized by the person, provided that any such authorization by email must set forth information from which it can be reasonably determined that the email was authorized by the member. If it is determined that such email authorization is valid, the inspectors or, if there are no inspectors, such other persons making that determination must specify the nature of the information upon which they relied.

The cyberlaw aspects of the Act will help New York non-profits carry out their missions in the 21st century. Other aspects of the Act are proving to be problematic for some non-profits. It will be interesting to see how the courts and the New York Attorney General interpret and enforce the provisions of the Act. [B]