

To: New Jersey Law Revision Commission  
From: Staff  
Re: Addendum to Memo on Corporate Books and Records  
Date: April 18, 2011

At the March meeting, Staff introduced to the Commission a potential project to revise a section of Title 14A, the New Jersey Business Corporation Act. The Commission asked the Staff for additional research on the section at issue dealing with a shareholder's right of inspection to corporate books and records, 14A:5-28. The discussion below corresponds to the questions the Commission asked.

#### Comparison to Business Corporation Model Act and to other state's laws

The American Bar Association has promulgated a Model Business Corporation Act. The Act was first promulgated in 1950 and has undergone periodic updates and revisions since then, with a complete revision made in 1984. At least 30 states have incorporated some of the Model Act into their statutes, including New Jersey. New Jersey last made major revisions to the New Jersey Business Corporation Act in 1988. The revisions were based on the recommendations of the Corporation Law Revision Commission.

There is considerable overlap between the Model Act and New Jersey's statute. Section 16.02 (b)(1) of the Model Act gives a shareholder the right to inspect and copy "excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors . . . minutes of any meeting of the shareholders . . . and records of action taken by the shareholders or board of directors." Under the Model Act a shareholder's demand for records is limited by "good faith and for a proper purpose" with requirements for reasonable particularity and a direct connection to the purpose (additional requirements not found in the New Jersey statutes). §16.02 (c). The Model Act also provides for court-ordered inspections if a corporation refuses to grant inspection to a shareholder.

Under Delaware law a stockholder ("beneficial owner") has the right to inspect a corporation's stock ledger, list of stockholders and books and records, limited to a proper purpose. 8 Del. Code § 220. A stockholder's right to inspect in Delaware is broad once granted, but it may be more difficult than in New Jersey to show a proper purpose. See *City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.* 1 A.3d. 281, 288 (Del. 2010). A corporation's form of records include "[a]ny records maintained by a corporation in the regular course of its business, including . . . books of account, and minute books." 8 Del. Code §224. The records are available upon request to those allowed to inspect them. *Id.*

It appears that the Model Act and Delaware law approach the issue in the same way the court in *Cain v. Merck* did. That is, when "minutes" is limited to minutes of shareholder meetings as in subsection 3 of 14A:5-28, the board and executive minutes are not included. But, when "minutes" is used without qualification, the term refers to the minutes of proceedings a corporation keeps as required by law. New Jersey corporations are required by 14A:5-28(1) to keep "books and records of account and minutes of the proceedings of its shareholders, board

and executive committee.” It seems consistent with both the Model Act and Delaware law that the “minutes” referred to in subsection 4 applies to all the minutes a corporation has available.

### Scope of applicability

The right of inspection under 14A:5-26 applies to shareholders and not to the general public. Subsection 4 gives a court the power to compel production of books, records and minutes to “a shareholder” showing a proper purpose. A shareholder’s purpose may be found to be improper where the shareholder acts in bad faith, with ulterior motives, or with intent to destroy the corporation. *See Feist v. Joseph Dixon Crucible Co.* 30 N.J. Super. 153, 157 (App. Div. 1954). Therefore, if a shareholder meets the requirements of proving a proper purpose under subsection 4, the right of inspection ordered by a court shall apply. *Wyckoff v. Hardware Supply Co.* 134 N.J.L. 172, 173-74 (1946) (“a common stockholder has the right of inspection of the books and records of a corporation to determine whether there has been proper management of the business”). Throughout the statute the term “shareholder” is used consistently and nowhere are rights of the general public to demand business records from a corporation mentioned. It appears unlikely that the Legislature intended to extend the right of inspection to any member of the general public, but instead reserves that right for shareholders of a corporation.

### Voting and non-voting shareholders

The statute appears to apply to holders of both voting and non-voting shares of stock. The class or series of shares held is irrelevant for the purposes of the right of inspection under subsection 3. *See* 14A:5-28(3) (provisions apply to “[a]ny person who shall have been a shareholder of record of a corporation . . . [of] shares of any class or series”). Subsection 4 merely refers to “a shareholder” and “a shareholder of record” without any qualification on the shareholder’s voting rights within the corporation. 14A:5-28(4).

The NJ Business Corporation Act elsewhere addresses the division of shares into classes and series. In its certificate of incorporation, a corporation is to specify if shares will be divided, the designation of classes and series, and the relative rights, preferences and limitations of the divided shares. N.J.S. 14A:2-7 (1)(d); 14A:7-2 (1) (allowing for changes to divisions through amendments to original certificate of incorporation). A corporation is able to include provisions in its certificate of incorporation so long as the provision is not inconsistent with other provisions of the Business Corporation Act or any other NJ statute. N.J.S. 14A:2-7 (1)(f).

If a corporation, through its certificate, was to restrict the rights of its shareholders to inspect records, it would run afoul of the application subsection 3 of 14A:5-28 (allowing limited access to shareholder records). Such a restriction would also conflict with the even broader application of subsection 4, which extends the right to inspect to a shareholder without limitation of amount or duration of holdings, so long as a court is satisfied a proper purpose is shown to exist. Contrary to subsection 3’s limits to only shareholder records and minutes, subsection 4 contains no such explicit restriction. The court’s power to compel inspection under subsection 4 seems unimpaired by anything but (1) a shareholder (2) showing a proper purpose. Thus, it appears a corporation cannot limit a shareholder’s right to inspect based on the class or series of

the shares held, but the original question of *Cain v. Merck* concerning the extent of the inspection remains.

#### Beneficial holder or street name holder

*N.J.S.* 14A:1-2.1(l) defines “Shareholder” as “one who is a holder of record of shares in a corporation.” In addition, the definition section of 14A defines “authorized shares” to mean “shares of all classes and series which the corporation is authorized to issue.” 14A:1-2.1(c). The statute most likely applies to the beneficial holder of the shares of stock. A beneficial holder is the holder of equitable title to the stock. *Black’s Law Dictionary* (9th Ed.). The “shareholder” under the statutes is the one who receives notice of shareholder meetings, the one who may be entitled to vote at such meetings, the one who may arrange for proxy or group voting, among other rights. *See N.J.S.* 14A:5-4, 14A:5-10, and 14A:5-19. In none of these sections does a street name holder or stock broker have the power to act in ways statutorily reserved to a shareholder. It follows that the reference to “shareholder” throughout 14A:5-28 should refer to the beneficial holder of the stock because the right of inspection is aligned with the other rights specified elsewhere in the statute. Because each section of 14A should be read in union with the others unless otherwise noted, it seems unlikely the Legislature intended, without explicit mention, that the term “shareholder” should be read differently here.