

To: New Jersey Law Revision Commission
From: Whitney Schlimbach, Counsel
Re: Corporate Books and Records of Account
Date: January 17, 2023

Project Summary¹

The New Jersey Business Corporation Act, in Title 14A, addresses a range of topics related to the formation, management, and dissolution of corporations.² Pursuant to N.J.S. 14A:5-28(1), a corporation is required to “keep books and records of account and minutes of the proceedings of its shareholders, board and executive committee.”³ Pursuant to N.J.S. 14A:5-28(4), shareholders who have demonstrated a “proper purpose”⁴ to the court are permitted to inspect “the books and records of account, minutes, and record of shareholders of a corporation.”⁵

In *Feuer v. Merck & Co., Inc.*, the Appellate Division considered “the scope of a shareholder’s right to inspect corporate records under N.J.S.A. 14A:5-28 and the common law.”⁶ The *Feuer* Plaintiff first demanded that Merck’s board of directors commence suit against itself and the corporation, and subsequently requested inspection of documents related to the corporation’s rejection of that demand.⁷ The court found that “books and records of account consist of accounting or financial documents,” but do “not necessarily encompass all financial documents of a corporation.”⁸ The court held that, under the “plain language” of the statute, the Plaintiff’s “document demands exceed[ed] the scope of inspection that the statute authorizes.”⁹

During its January 23, 2020, meeting, the New Jersey Law Revision Commission (“Commission”) discussed a Draft Tentative Report that proposed modifications to N.J.S. 14A:5-28, limiting the term “books and records of account” to “accounting and financial documents.”¹⁰ The Commission agreed that the proposed language was “too broad” and authorized a review of the definition of “financial statements” in N.J.S. 45:2B-44,¹¹ as well as approaches taken by other

¹ Preliminary work on this project was conducted by Mark D. Ygarza during his tenure as a Legislative Fellow with the N.J. Law Revision Comm’n.

² N.J. STAT. ANN. §§ 14A:1-1 to 14A:18-11 (West 2022).

³ N.J. STAT. ANN. § 14A:5-28(1) (West 2022).

⁴ See e.g. *Feist v. Joseph Dixon Crucible Co.*, 30 N.J. Super. 153, 158 (App. Div. 1954) (recognizing right of inspection when “application is made in good faith and is for a purpose germane to the applicant's rights as a stockholder”), quoting *Feick v. Hill Bread Co.*, 91 N.J.L. 486, 488 (Sup.Ct.1918), *aff’d* 92 N.J.L. 513 (E. & A. 1918).

⁵ N.J. STAT. ANN. § 14A:5-28(4).

⁶ *Feuer v. Merck & Co., Inc.*, 455 N.J. Super. 69 (App. Div. 2018), *cert. granted* 236 N.J. 227, *aff’d* 238 N.J. 27.

⁷ *Id.* at 73.

⁸ *Id.* at 78-79.

⁹ *Id.* at 83.

¹⁰ N.J. Law Revision Comm’n, *Minutes NJLRC Meeting*, at *3-4 (Jan. 23, 2020), <https://www.njlrc.org/minutes-and-agendas> (last visited Nov. 28, 2022).

¹¹ *Id.*

states with regard to this term, for guidance.¹²

The statutes and case law of other states do not employ a common definition of the term “books and records of account,” except among states that have adopted the list of corporate records subject to shareholder inspection found in post-1984 versions of the Model Business Corporation Act (“MBCA”).¹³

Additionally, the New Jersey Corporate and Business Law Study Commission is charged with the duty to “study and review all aspects of the New Jersey statutes, legislation and decisions of the courts in this State and other states relating to business entities.”¹⁴

The Commission Staff seeks guidance from the Commission regarding the direction of this project.

Statute Considered

N.J.S. 14A:5-28 provides, in relevant part:

(1) Each corporation shall keep books and records of account and minutes of the proceedings of its shareholders, board and executive committee, if any. . . .

* * *

(4) Nothing herein contained shall impair the power of any court, upon proof by a shareholder of proper purpose, irrespective of the period of time during which the shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders of a corporation. The court may, in its discretion prescribe any limitations or conditions with reference to the inspection, or award any other or further relief as the court may deem just and proper. The court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in this State upon whatever terms and conditions as the order may prescribe. In any action for inspection the court may proceed summarily.¹⁵

Background

In *Feuer v. Merck & Co., Inc.*, a Merck shareholder (“Plaintiff”) brought an action to

¹² *Id.* at *4.

¹³ *See infra* at note 54.

¹⁴ *See* N.J. Stat. Ann. 1:14-14(a) (West 2022).

¹⁵ N.J. STAT. ANN. § 14A:5-28 (emphasis added).

compel the production of documents related to the activities of a “Working Group” appointed by Merck’s board of directors to evaluate his demand that Merck’s board of directors commence suit against itself and the corporation.¹⁶ Plaintiff asserted his right to inspection pursuant to N.J.S. 14A:5-28(4), “to search for evidence that Merck acted wrongfully when it rejected” his demand.¹⁷ Although the corporation provided “pertinent minutes of the board and the Working Group” to Plaintiff, his inspection demand was “otherwise refused.”¹⁸

The trial court held that, although Plaintiff had a “proper purpose” under N.J.S. 14A:5–28, “the documents [he] sought fell outside ‘books and records of account,’ and the common law did not expand the statutory inspection right.”¹⁹ Plaintiff appealed, arguing that N.J.S. 14A:5-28(4) “entitled him to the documents that Merck withheld.”²⁰

Analysis

The Appellate Division explained that “rather than directly entitle any shareholder to inspect documents,” N.J.S. 14A:5-28(4) “preserves the court’s power to grant inspection to shareholders, irrespective of their time or percentage of ownership, for a proper purpose.”²¹ Such inspections are limited to “books and records of account, minutes and record of shareholders of a corporation.”²² The *Feuer* court noted that Plaintiff did “not seek a ‘record of shareholders,’ and Merck disclosed minutes of both the board’s and the Working Group’s minutes.”²³

Regarding the phrase “books and records of account,” the Court examined case law from other jurisdictions, as well as the definition in Black’s Law Dictionary.²⁴ In *Pederson v. Arctic Slope Reg’l Corp.*,²⁵ the Alaska Supreme Court held that “books and records of account consist of accounting or financial documents,”²⁶ which the *Feuer* court found was “consistent with the phrase’s common meaning,” as set forth in Black’s Law Dictionary.²⁷

¹⁶ *Feuer*, 455 N.J. Super. at 73.

¹⁷ *Id.* at 73.

¹⁸ *Id.* at 75.

¹⁹ *Id.*

²⁰ *Id.* at 76.

²¹ *Id.* at 77.

²² *Id.*; see also N.J. STAT. ANN. § 14A:5-28(4).

²³ *Id.* at 78 (explaining that “[m]inutes record a meeting, but do not necessarily encompass documents presented at the meeting”).

²⁴ *Id.*

²⁵ 331 P.3d 384 (Alaska 2014).

²⁶ *Feuer*, 455 N.J. Super. at 78, citing *Pederson*, 331 P.3d at 397 (“The statutory phrase ‘books and records of account’ encompasses monthly financial statements, records of receipts, disbursements and payments, accounting ledgers, and other financial accounting documents, including records of individual executive compensation and transfers of corporate assets or interests to executives.”).

²⁷ *Feuer*, 455 N.J. Super. at 78, citing *Black’s Law Dictionary* 207, 1504 (9th ed. 2009) (defining “books of account” as “shop books,” which are “[r]ecords of original entry maintained in the usual course of a business by a shopkeeper, trader or other business person”).

However, the phrase “does not encompass any and all records, books, and documents of a corporation,” nor even “all financial documents of a corporation.”²⁸ The *Feuer* court cited to *Susquehanna Corp. v. Gen’l Refractories Co.*,²⁹ in which the Eastern District of Pennsylvania held that “‘records of another corporation whose acquisition is contemplated’ and ‘the proposed contract’” are excluded.³⁰ Similarly, the Missouri Supreme Court excluded “‘analyses or tentative studies’ . . . ‘in the nature of confidential inter-office communications’” in *State ex rel. Jones v. Ralston Purina Co.*^{31 32} Finally, the Wisconsin Court of Appeals has construed the phrase to “exclude [a] corporation’s ‘interim profit and loss statements.’”³³

The *Feuer* Court also compared the phrase “books and records of account,” to “the court’s power to order a corporation to bring into the State ‘books, documents and records’” in the third sentence of N.J.S. 14A:5-28(4).³⁴ Noting that “[b]ooks’ and ‘records’ in that sentence are not limited to those of *account*; and ‘documents’ are included as well,”³⁵ the court determined that if “the Legislature intended ‘books and records of account’ . . . to mean books and records and documents generally, it would have said so,” as it did in the third sentence of subsection four.³⁶

The Court additionally noted in the *Feuer* case that the documents sought by Plaintiff were largely “documents the corporation generated as it considered and rejected his [initial] demand” of a lawsuit.³⁷ The Court concluded “[t]hat inspection demand is one significant step removed from a shareholders’ demand for documents prepared in the usual course pertaining to the corporation’s management or suspected mismanagement.”³⁸

Based on its interpretation of the phrase “books and records of account” and the fact that Plaintiff requested inspection of documents he “effectively forced the creation of . . . upon his or her allegation of mismanagement,”³⁹ the *Feuer* Court held that Plaintiff’s demand “exceed[ed] the scope of inspection that the statute authorizes.”⁴⁰

²⁸ *Feuer*, 455 N.J. Super. at 78-79.

²⁹ 250 F. Supp. 797, 800–01 (E.D. Pa.), *aff’d in part, rev’d in part*, 356 F.2d 985 (3d Cir. 1966).

³⁰ *Feuer*, 455 N.J. Super. at 78, *quoting Susquehanna Corp.*, 250 F.Supp. at 801.

³¹ 358 S.W.2d 772 (Mo. 1962).

³² *Feuer*, 455 N.J. Super. at 78, *citing State ex rel. Jones*, 358 S.W.2d at 778.

³³ *Feuer*, 455 N.J. Super. at 78, *citing Bitters v. Milcut, Inc.*, 117 Wis. 2d 48, 53 (Ct. App. 1983).

³⁴ *Feuer*, 455 N.J. Super. at 79.

³⁵ *Id.* (emphasis added).

³⁶ *Id.*

³⁷ *Id.* at 89.

³⁸ *Id.*

³⁹ *Id.* at 89-90.

⁴⁰ *Id.* at 83. The *Feuer* court also addressed whether N.J.S. 14A:5-28 abrogated the common law right of inspection. *Id.* Although the court acknowledged that the relevant “[i]nterpretative maxims are at odds,” it noted “there would be no apparent reason for the statute to preserve common law rights, as delineated in subsection four, if common law rights beyond those survived.” *Id.* at 86. Additionally, the *Feuer* court explained that the MBCA drafters explicitly intended the model act provision on which the statute is based to be “comprehensive,” and therefore, presumably intended it “to occupy the field, and supplant a coexisting common law inspection regime outside the statute.” *Id.* at 86-87. Ultimately, however, the court declined to “decide whether the residual common law is abrogated by N.J.S.A.

Source of the Phrase “Books and Records of Account”

- *Model Business Corporation Act*

Originally published in 1946 by the Committee on Corporate Laws of the Corporation, Banking and Business Law Section of the American Bar Association, the Model Business Corporation Act (“MBCA”) provides states with a modern body of statutory corporate law.⁴¹ Since its publication, the MBCA has been revised several times.⁴²

The 1960 revision of the MBCA was a significant influence on the development of the New Jersey Business Corporation Act in Title 14A, enacted in 1968.⁴³ Until its 1984 revision (“1984 MBCA”), the MBCA addressed corporate records and shareholder inspection rights in a single provision, which provided the template for N.J.S. 14A:5-28.⁴⁴

In the 1984 MBCA, however, the relevant model act provision was divided into two sections, addressing required corporate records (Section 16.01) and shareholder inspection rights (Section 16.02) separately.⁴⁵ This division was maintained in subsequent versions of the MBCA, including the most recent version, which was revised in 2016 and updated through September 2021 (“2016 MBCA”).⁴⁶

Pursuant to Section 16.01 of the 2016 MBCA, a corporation must maintain “all annual financial statements,” “accounting records,” and a “record of its current shareholders.”⁴⁷ In addition, Section 16.01(a) in the 2016 MBCA lists seven additional categories of records that a corporation is required to maintain.⁴⁸

14A:5-28,” because even “assuming for argument’s sake that the common law survives . . . it provides no relief under the facts and circumstances of this case.” *Id.* at 87.

⁴¹ Wendell H. Holmes, *The Revised Model Business Corporation Act and Corporate Law Reform in Mississippi: Part One*, at 165, FN 3 (1986), *Journal Articles*, 327, available at <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1327&context=faculty_scholarship> (“ . . . the first preliminary draft of the Model Act appeared in 1943; in 1946, the Corporation Law Committee of the American Bar Association promulgated the ‘Model for State Business Corporation Acts’; other revisions followed in 1950, 1953, 1959, and 1969.”).

⁴² See e.g. American Bar Association website: MBCA 2016 Revision and Prior Versions, available at <https://www.americanbar.org/groups/business_law/committees/corplaws/>.

⁴³ N.J. STAT. ANN. §§ 14A:1-1 to 14A:18-11.

⁴⁴ Committee on Corporate Laws of the Section of Corporation, Banking & Business Law, American Bar Association, *Revised Model Business Corporation Act (1984) Professional Corporation Supplement Close Corporation Supplement*, 3rd Ed., Vol. 4, §16.01 (1984) (“Prior versions of the Model Act described mandatory corporate records in the most general terms.”) [hereinafter *1984 MBCA*].

⁴⁵ *Id.* at pp. 1710-11, 1718.1-20.

⁴⁶ American Bar Association, *Model Business Corporation Act (2016 Revision)* (Dec. 9, 2017) [hereinafter *2016 MBCA*].

⁴⁷ *Id.* at 359 (Section 16.01(b)-(d)).

⁴⁸ *Id.* (“(1) its articles of incorporation as currently in effect; (2) any notices to shareholders referred to in section 1.20(k)(5) specifying facts on which a filed document is dependent if those facts are not included in the articles of incorporation or otherwise available as specified in section 1.20(k)(5); (3) its bylaws as currently in effect; (4) all

Section 16.02, governing shareholder inspection rights, provides that any shareholder who gives timely written notice is entitled to inspect the seven categories of records listed in section 16.01(a).⁴⁹ In addition, a shareholder who makes a demand “in good faith and for a proper purpose”⁵⁰ is entitled to inspect the corporation’s “financial statements” and “accounting records,” as well as “excerpts from minutes” of board of director’s meetings, and “the record of shareholders.”⁵¹

Since 1984, the MBCA has included this detailed list of the books and records that a corporation must maintain and that shareholders are entitled to inspect.⁵² Like New Jersey, most state statutes are aligned with some version of the MBCA’s provision(s) addressing corporate records and shareholder inspection rights.⁵³ Twenty-nine states and the District of Columbia have incorporated language from the 1984 MBCA or a more recent version, and adopted a finite list of records that a shareholder may inspect.⁵⁴

Although it has adopted many MBCA provisions over the past fifty years,⁵⁵ the New Jersey Legislature has not incorporated the list of documents and records subject to shareholder inspection that is set forth in the more recent versions of the MBCA.

written communications within the past three years to shareholders generally; (5) minutes of all meetings of, and records of all actions taken without a meeting by, its shareholders, its board of directors, and board committees established under section 8.25; (6) a list of the names and business addresses of its current directors and officers; and (7) its most recent annual report delivered to the secretary of state under section 16.21.”)

⁴⁹ *Id.* at 362 (“excluding minutes of meetings of, and records of actions taken without a meeting by, the corporation’s board of directors and board committees established under section 8.25”).

⁵⁰ *Id.* (requiring also that “[1] the shareholder’s demand describes with reasonable particularity the shareholder’s purpose and the records the shareholder desires to inspect; and [2] the records are directly connected with the shareholder’s purpose”).

⁵¹ *Id.* (“(1) the financial statements of the corporation maintained in accordance with section 16.01(b); (2) accounting records of the corporation; (3) excerpts from minutes of any meeting of, or records of any actions taken without a meeting by, the corporation’s board of directors and board committees maintained in accordance with section 16.01(a); and (4) the record of shareholders maintained in accordance with section 16.01(d).”).

⁵² 1984 MBCA, *supra* note 44.

⁵³ See e.g. American Bar Association website: MBCA Enactment Map (as of Jan. 1, 2022), available at <https://www.americanbar.org/groups/business_law/committees/corplaws/>.

⁵⁴ D.C. CODE § 29-313.02(b) (West 2022); ALA. CODE § 10A-2A-16.02(b) (West 2022); ARIZ. REV. STAT. ANN. § 10-1602(B) (West 2022); ARK. CODE ANN. § 4-27-1602(b) (West 2022); COLO. REV. STAT. § 7-116-102(2) (West 2022); CONN. GEN. STAT. ANN. § 33-946(c) (West 2022); FLA. STAT. ANN. § 607.1602; GA. CODE ANN. § 14-2-1602(c) (West 2022); IDAHO CODE ANN. § 30-29-1602(b) (West 2022); IND. CODE § 23-1-52-2(b) (West 2022); IOWA CODE ANN. § 490.1602(2) (West 2022); KY. REV. STAT. ANN. § 271B.16-020(2) (West 2022); ME. REV. STAT. ANN. TIT. 13-C, § 1602(3) (West 2022); MASS. GEN. LAWS ANN. CH. 156, § 16.02(b) (West 2022); MISS. CODE ANN. § 79-4-16.02(b) (West 2022); MONT. CODE ANN. § 35-14-1602(2) (West 2022); NEB. REV. STAT. § 21-2-2,222(c) (West 2022); N.H. REV. STAT. ANN. § 293-A:16.02(c) (West 2022); N.C. GEN. STAT. ANN. § 55-16-02(b) (West 2022); OR. REV. STAT. ANN. § 60.774(2) (West 2022); S.C. CODE ANN. § 33-16-102(b) (West 2022); S.D. CODIFIED LAWS § 47-1A-1602.1 (West 2022); TENN. CODE ANN. § 48-26-102(b) (West 2022); UTAH CODE ANN. § 16-10a-1602(2) (West 2022); VT. STAT. ANN. TIT. 11A, § 16.02(b) (West 2022); VA. CODE ANN. § 13.1-771(C) (West 2022); WASH. REV. CODE § 23B.16.020(2) (West 2022); W. VA. CODE ANN. § 31D-16-1602(b) (West 2022); WIS. STAT. ANN. § 180.1602(2)(a) (West 2022); WYO. STAT. ANN. § 17-16-1602(b) (West 2022).

⁵⁵ See *infra* at p.7.

- *Legislative History of N.J.S. 14A:5-28*

In 1968, the Legislature repealed extensive portions of the General Corporation Law of New Jersey (Title 14) and enacted the Business Corporation Act in Title 14A.⁵⁶ The new statutory scheme in Title 14A was developed by the Corporation Law Revision Commission (“CLRC”).⁵⁷

The CLRC was created by the New Jersey Legislature in 1958, and charged with the duty

to modernize the corporation laws of this State so as to embody principles and procedures representing the best in modern American statutory law applicable to business corporations, in general, to eliminate ambiguities, outmoded procedures and conflicting, overlapping and redundant provisions, and to present statutes applicable to business corporations, in a logical, clear and concise manner.⁵⁸

The work of the CLRC culminated in the issuance of a 1968 Report, which formed the basis for the bill enacted as Title 14A.⁵⁹ In its Report, the CLRC noted that it “adopted, in spirit if not in letter,” many provisions of the MBCA, and “borrowed from the statutes of such leaders of corporate law as Delaware, New York and Illinois.”⁶⁰ The CLRC also gave “[g]reat weight . . . to the existing statute law in New Jersey . . . and to the large body of case law in th[e] state.”⁶¹ Among the newly enacted statutes was N.J.S. 14A:5-28, which the CLRC based on the 1960 version of the MBCA (“1960 MBCA”), New York corporation law, and three repealed statutes in Title 14.⁶²

Subsection one of N.J.S. 14A:5-28 requires corporations to keep “books and records of account,” and was derived from three sources: (1) N.J.S. 14:5-1.1; (2) the first paragraph of Section 46 of the 1960 MBCA; and (3) §624 of New York’s Business Corporation Law.⁶³ N.J.S. 14A:5-28(1) requires corporations to keep “books and records of account,” rather than “*correct and complete* books and records of account,” as was required in the 1960 MBCA.⁶⁴ The CLRC also noted that N.J.S. 14A:5-28(1) was “broadly enough expressed to make specific re-enactment of R.S. 14:5-1.1 unnecessary.”⁶⁵ That statute had required corporations to keep “transfer books [and]

⁵⁶ N.J. STAT. ANN. §§ 14A:1-1 to 14A:18-11.

⁵⁷ See Corp. Law Revision Comm’n, ‘*Report of Corporation Law Revision Commission and Commissioners’ Comments to Proposed Revision of the General Corporation Law of New Jersey (Senate, No. 884)*’ (June 20, 1968) [hereinafter *1968 CLRC Report*]; see also S.B. 884, 1968 Leg., 193rd Sess. (1968).

⁵⁸ N.J. STAT. ANN. § 1:14-3 (1958) (expired Dec. 31, 1984).

⁵⁹ *1968 CLRC Report*, *supra* note 57; see also S.B. 884, 1968 Leg., 193rd Sess. (1968).

⁶⁰ *Id.* at iii-iv.

⁶¹ *Id.* at iv.

⁶² *Id.* at 77.

⁶³ *Id.*

⁶⁴ Committee on Corporate Laws, American Bar Foundation, Ed., *Model Business Corporation Act Annotated*, Vol. 2, §46, ¶1, p.113 (1960) [hereinafter *1960 MBCA*].

⁶⁵ *1968 CLRC Report*, *supra* note 57, at 77.

stock books” open to stockholder examination.⁶⁶

In addition, the CLRC indicated that N.J.S. 14A:5-28(4) was based on the fourth paragraph of Section 46 of the 1960 MBCA.⁶⁷ As originally enacted, N.J.S. 14A:5-28(4) was practically identical to the language used in the 1960 MBCA, and read as follows:

Nothing herein contained shall impair the power of any court, upon proof by a shareholder of proper purpose, irrespective of the period of time during which such shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders of a corporation.⁶⁸

Although N.J.S. 14A:5-28 was subsequently amended in 1973,⁶⁹ 1988,⁷⁰ 2017,⁷¹ and 2021,⁷² the amendments did not alter the language at issue in *Feuer*, nor did they provide any additional insight into the scope of the phrase “books and records of account.”

In 2021, the Legislature amended N.J.S. 14A:5-28 and added language that permitted “corporations [to] utilize electronic networks . . . in order to meet recordkeeping requirements.”⁷³ The Sponsor’s Statement explained the bill was “based on recent changes to the Delaware General Corporation Law.”⁷⁴

⁶⁶ *Feist v. Joseph Dixon Crucible Co.*, 30 N.J. Super. 153, 156 (App. Div. 1954) (quoting N.J.S.A. 14:5—1, which provides “[e]very corporation of this state shall keep at its principal office the transfer books, in which the transfer of stock shall be registered, and the stock books, which shall contain the names and addresses of the stockholders and the number of shares held by them respectively, open at all times during the usual hours for business to the examination of every stockholder, and for the transfer of stock.”).

⁶⁷ *Id.* See also 1960 MBCA, *supra* note 64, at 113 (“Nothing herein contained shall impair the power of any court of competent jurisdiction, upon proof by a shareholder of proper purpose, irrespective of the period of time during which such shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders of a corporation.”) (underlined portion appears in MBCA, but not in N.J.S. 14A:5-28(4)).

⁶⁸ S.B. 884, 1968 Leg., 193rd Sess. (1968).

⁶⁹ L.1973, c. 366, § 19, eff. May 1, 1974. See also Corporation Law Revision Commission, *Final Report of the Corporation Law Revision Commission*, at 43 (June 15, 1972) (eliminating “the burdensome requirement that small publicly-held corporations, headquartered or with transfer agents outside of New Jersey, keep duplicate shareholder records.”).

⁷⁰ L.1988, c. 94, § 22, eff. Dec. 1, 1988 (requiring records to be kept in readable format, among other changes). See *Cain v. Merck & Co.*, 415 N.J. Super. 319, 329 (App. Div. 2010) (clarifying the court’s “power to proceed summarily, to impose limitations and conditions on inspection and provide relief as it deems ‘just and proper’ . . .”).

⁷¹ L.2017, c. 364, § 1, eff. Jan. 16, 2018 (clarifying that “corporations [may] impose reasonable limitations or conditions on the use or distribution” of books and records subject to shareholder inspection). This amendment was proposed by the New Jersey Corporate and Business Law Study Commission. See Sponsor’s Statement to AB 2975, 2017 Leg., 217th Leg. (Feb. 16, 2016).

⁷² L.2021, c. 238, § 1, eff. Sept. 28, 2021.

⁷³ L.2021, c. 238, § 1, eff. Sept. 28, 2021.

⁷⁴ Sponsor’s Statement to A.B. 1178, 2020 Leg., 219th Sess., at 5 (Oct. 22, 2020).

Other State Statutes and Case Law

Although a majority of states have incorporated the MBCA's detailed list of records, many states, like New Jersey, have codified prior versions of the MBCA to permit the inspection of "books and records of account."⁷⁵ Other states have developed their own lists of records available for inspection by shareholders.⁷⁶ There is not universal agreement regarding the specific documents and records which fall within the definition of "books and records of account," except among those states that have adopted a post-1984 MBCA provision.⁷⁷

Synthesizing a common definition is difficult in part because, although many states have developed a broad right of inspection,⁷⁸ there is still disagreement among states regarding the breadth of the shareholder inspection right.⁷⁹ In addition, the statutory phrase "books and records of account" is most often interpreted in the context of specific factual scenarios. As a result, many

⁷⁵ ALASKA STAT. ANN. § 10.06.430 (West 2022); ARK. CODE ANN. § 4-26-715 (West 2022); 805 Ill. Comp. Stat. Ann. 5/7.75 (West 2022); MO. REV. STAT. § 351.215 (West 2022); N.M. STAT. ANN. § 53-11-50 (West 2022); N.Y. BUS. CORP. LAW § 624 (West 2022); OHIO REV. CODE ANN. § 1701.37 (West 2022); 15 PA. CONS. STAT. § 1508 (West 2022); R.I. GEN. LAWS § 7-1.2-1502 (West 2022).

⁷⁶ CAL. CORP. CODE § 1601(a)(1); DEL. CODE ANN. TIT. 8, § 220(b); HAW. REV. STAT. ANN. § 414-470(a); KAN. STAT. ANN. § 17-6510(b); LA. REV. STAT. ANN. § 12:1-1602(C); MD. CODE ANN., CORPS. & ASS'NS § 2-512(a); MICH. COMP. LAWS ANN. § 450.1487(2); NEV. REV. STAT. § 78.257(1)-(2); OKLA. STAT. ANN. TIT. 18, § 1065(B); TEX. BUS. ORGS. CODE ANN. § 21.218(b).

⁷⁷ See *Corwin v. Abbott Lab'ys*, 353 Ill. App. 3d 848 (2004) (permitting shareholder to inspect "internal investigatory reports and any and all 'document[s] received by any' board member . . . relating to the federal investigation of" its subsidiary) and *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 750 (Del. 2019) (permitting inspection of relevant e-mails), but compare *State ex rel. Brown v. III Invs., Inc.*, 80 S.W.3d 855, 860 (Mo. Ct. App. 2002) ("This statutory right [of inspection] does not extend to documents aside from the "books" of the corporation, like confidential inter-office communications containing internal analysis or tentative studies prepared for the information of management."). See also *State v. Malleable Iron Range Co.*, 187 N.W. 646, 648 (1922) (allowing shareholder access to "work sheets and schedule [that had] not been carried upon the books of the corporation, and [had] not been adopted by the corporation"), but compare *Goldstein v. Lees*, 46 Cal. App. 3d 614, 621, n.6 (Ct. App. 1975) (interpreting "books of account" to only "comprise the formal records of the corporation and [allowing] the shareholder . . . to inspect all of the formal records of the corporation.").

⁷⁸ See e.g. *Ashley Bancstock Co. v. Meredith*, 2017 Ark. App. 598, 11 (2017) ("We conclude that a broad definition of the term books and records of account is proper"); *Schein v. N. Rio Arriba Elec. Co-op., Inc.*, 1997-NMSC-011, ¶ 13, 122 N.M. 800, 803-804 ("This Court supports a policy which grants generous access to corporate information by shareholders/members."); *Weigel v. O'Connor*, 57 Ill. App. 3d 1017, 1025 (1978) ("A shareholder is legitimately entitled to know anything and everything which the records, books and papers of the company would show so as to protect his interest"); *Meyer v. Ford Indus., Inc.*, 272 Or. 531, 541 (1975) (employing a "broad and liberal interpretation" of the term "books and records of account"); *State ex rel. McClure v. Malleable Iron Range Co.*, 187 N.W. 646, 647-48 (1922) (extending inspection to "all papers, contracts, minute books, or other instruments from which he can derive any information which will enable him to better protect his interests and perform his duties."); *Pfirman v. Success Mining Co.*, 166 P. 216, 217 (1917) (permitting inspection "of the records, books, and papers in the office of the [corporation] of every kind and nature and description whatsoever").

⁷⁹ See *Feuer*, 455 N.J. Super. at 79 ("[w]e are unpersuaded by the contrary view, adopted by the Oregon Supreme Court, which holds that 'books and records of account' should be given a 'broad and liberal construction so as to extend to all records, contracts, papers and correspondence to which the common law right of inspection of a stockholder may properly apply.'"); see also *Bitters*, 117 Wis. 2d at 52-53 (rejecting "a broad interpretation of 'books and records of account'" and excluding "interim financial statements [including] interim profit and loss statements and balance sheets").

types of documents and records subject to shareholder inspection in one state have not been addressed by other states, including New Jersey.⁸⁰

Multiple jurisdictions, for example, have held that executive compensation information is accessible under a shareholder inspection statute.⁸¹ In 2019, the Supreme Court of Delaware noted that “the general category of ‘books and records,’ . . . has long been understood to cover both official corporate records and less formal written communications,” and therefore, allowed shareholder access to email communications between corporate officers.⁸² New Jersey courts have not addressed whether either of these categories of information is accessible to shareholders under the statutory right of inspection.⁸³

It is not clear that extrapolating a definition of the phrase “books and records of account” from the various interpretations of that language in other states would address either the range of specific corporate documents and records that shareholders may request to inspect, or the scope of the statutory language determined by New Jersey courts.

In addition, although New Jersey courts have cited the statutory interpretations of certain jurisdictions with approval,⁸⁴ and the New Jersey Legislature has expressly relied on the statutes

⁸⁰ See e.g. *Ashley Bancstock Co.*, 2017 Ark. App. at 12 (holding that “books and records of account” encompasses “liability-insurance policies” because “[i]nsurance policies are contracts [and] contracts are business records pertinent to the operations of a corporation”); *Reilly v. Coppertech, Inc.*, 19 Pa. D. & C.3d 349, 351 (Pa. Com. Pl. 1981) (finding a shareholder with a proper purpose “has the right to see the original records” of “cash receipts and disbursements, accounts receivable and payable ledgers, financial reports, checkbooks, books of original entry, bank reconciliations and Federal and state tax returns”); *Weigel*, 57 Ill. App. 3d at 1027 (1978) (allowing shareholder inspection of “television logs, contracts with advertisers, and reports that the corporation . . . filed with the Federal Communications Commission”); *Goldstein*, 46 Cal. App. 3d at 621 (finding that “shareholder status does not in and of itself entitle an individual to unfettered access to corporate confidences and secrets”); *Susquehanna Corp.*, 250 F. Supp. at 800-01 (excluding “the records of another corporation whose acquisition is contemplated” and “the proposed contract”).

⁸¹ *Pederson*, 331 P.3d at 398, citing *Schluter v. Merritt Chapman & Scott*, 4 Del. J. Corp. L. 234, 236 (Del.Ch. Nov. 20, 1975); *Weigel*, 57 Ill.App.3d at 1022; *Cooke v. Outland*, 265 N.C. 601 (1965); *Meyer*, 272 Or. at 541; *Donna v. Abbotts Dairies, Inc.*, 161 A.2d 13, 16 (1960).

⁸² *KT4 Partners LLC*, 203 A.3d at 750, citing *Otis-Hidden Co. v. Scheirich*, 219 S.W. 191, 194 (1920); *Meyer*, 272 Or. at 541.

⁸³ See *Feuer*, 455 N.J. Super at 78-79 (“books and records of account” consist[s] of accounting or financial documents” but “not necessarily . . . all financial documents of a corporation”). Further complicating the issue is the fact that New Jersey courts have not explicitly decided whether the common law right of inspection is preserved or abrogated by N.J.S. 14A:5-28. *Id.* at 83. In *Feuer*, the court noted that “[t]he common law created an inspection right that is simultaneously both broader and more restrictive than the statutory right created in our modern act,” and which “is not necessarily limited to documentary categories specified in the statute.” *Feuer*, 455 N.J. Super at 83. The common law in New Jersey authorized “inspection of [books of account,] ‘records, contracts, federal reports, and other data of the respondent corporation as to the assets, liabilities, contract operations and practices and the administration of the affairs of the corporation.’” *Id.*, quoting *Kemp v. Sloss-Sheffield Steel & Iron Co.*, 128 N.J.L. 322, 322 (Sup. Ct. 1942). The court declined to decide “whether the residual common law is abrogated by N.J.S.A. 14A:5-28,” but noted that “there would be no apparent reason for the statute to preserve common law rights, as delineated in subsection four, if common law rights beyond those survived regardless of the savings provision.” *Feuer*, 455 N.J. Super at 86-87.

⁸⁴ See e.g. *Feuer*, 455 N.J. Super. at 78 (agreeing with the Alaska Supreme Court opinion in *Pederson* regarding the interpretation of the phrase “books and records of account”); see also *supra* note 26.

of other states in developing and updating Title 14A,⁸⁵ the language “books and records of account” in N.J.S. 14A:5-28 has not been clarified since the statute’s enactment in 1968.

Other Considerations

- *New Jersey Corporate and Business Law Study Commission*

Created by the Legislature in 1989, the Corporate and Business Law Study Commission (“CBLSC”) is charged with the duty to “study and review all aspects of the New Jersey statutes, legislation and decisions of the courts in this State and other states relating to business entities.”⁸⁶ It is composed of three members who are “admitted to practice law in New Jersey, and who are distinguished in the field of corporate and business law.”⁸⁷

In its most recent annual report (“CBLSC Report”), the CBLSC stated that it “continue[s] its practice of consulting the Model Business Corporation Act (MBCA) and surveying laws governing business entities in other states.”⁸⁸ The CBLSC Report also noted that “the Commission’s outreach and research has resulted in drafting” various Senate bills.⁸⁹

The CBLSC provided proposals or recommendations with respect to three bills introduced in 2016,⁹⁰ including the 2017 amendment to N.J.S. 14A:5-28 allowing a court to “impose reasonable limitations or conditions on the use or distribution of requested materials.”⁹¹ All three of the bills proposed by the CBLSC were enacted.⁹²

⁸⁵ See 1968 CLRC Report, *supra* note 57, at iii-iv (noting that the amendments to New Jersey’s corporation law “borrowed from the statutes of such leaders of corporate law as Delaware, New York and Illinois.”); see also Sponsor’s Statement to A.B. 1178, 2020 Leg., 219th Sess., at 5 (Oct. 22, 2020) (noting that the proposed amendment was “based on recent changes to the Delaware General Corporation Law”).

⁸⁶ See N.J. Stat. Ann. 1:14-14a. (West 2022).

⁸⁷ See N.J. Stat. Ann. 1:14-12b. (West 2022); see also New Jersey Legislature website: Legislative Commissions, New Jersey Corporate and Business Law Study Commission, available at <<https://www.njleg.state.nj.us/legislative-commissions#goToCBSC>>.

⁸⁸ New Jersey Corporate And Business Law Study Commission, 2010 Annual Report, at 3 (Oct. 1, 2011), available at <https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/34961/corporate_business_law_study_commission_2010.pdf?sequence=1&isAllowed=y>.

⁸⁹ *Id.* at 4 (S.B. 2494, 2010 Leg., 214th Leg. (Dec. 6, 2010); S.B. 2495, 2010 Leg., 214th Sess. (Dec. 6, 2010).

⁹⁰ See Sponsor’s Statement to A.B. 2970 (identical to S.B. 2236), 2016 Leg., 217th Sess., at *3 (Feb. 16, 2016) (“The New Jersey Corporate and Business Law Study Commission recommends the legislative reforms in this bill.”); Sponsor’s Statement to A.B. 2971 (identical to S.B. 2235), 2016 Leg., 217th Sess., at *3 (Feb. 16, 2016) (“This bill is recommended by The New Jersey Corporate and Business Law Study Commission.”); Sponsor’s Statement to A.B. 2975 (identical to S.B. 2238), 2016 Leg., 217th Sess., at *3 (Feb. 16, 2016) (“This bill is a proposal of The New Jersey Corporate and Business Law Study Commission.”).

⁹¹ See Sponsor’s Statement to A.B. 2975 (identical to S.B. 2238), 2016 Leg., 217th Sess., at *3 (Feb. 16, 2016). See also N.J. STAT. ANN. § 14A:5-28(6).

⁹² P.L. 2017, c. 362, eff. Jan. 16, 2018; P.L. 2017, c. 362, eff. Jan. 16, 2018; P.L. 2017, c. 364, eff. Jan. 16, 2018.

- *Definition of “Financial Statements” in N.J.S. 45:2B-44*

N.J.S. 45:2B-44, which defines “financial statements,” among other terms, is found in the New Jersey Accountancy Act of 1997.⁹³ The Act was enacted “to promote the reliability of information that is used for guidance in financial transactions or for accounting for or assessing the financial status or performance of commercial, noncommercial, and governmental enterprises.”⁹⁴ The definitions used in the Act are sets forth in N.J.S. 45:2B-44.⁹⁵ The definition of “financial statements” in N.J.S. 45:2B-44⁹⁶ was examined to ascertain whether it would provide insight into the scope of the phrase “books and records of account” as used in N.J.S. 14A:5-28(4).⁹⁷

The definitions contained in N.J.S. 45:2B-44 are explicitly applicable only to the Accountancy Act.⁹⁸ In addition, it is not apparent that the definition of “financial statements” in that Act is either sufficiently tailored to the “accounting or financial documents” the *Feuer* Court included within the scope of the term “books and records of account,” or sufficiently broad to capture the range of documents that potentially fall within its definition.⁹⁹

Pending Bills

There are no bills currently pending in the New Jersey Legislature that address N.J.S. 14A:5-28.

Conclusion

Shareholder inspection rights in N.J.S. 14A:5-28 permit inspection of certain specified corporate documents, as well as “books and records of account.” To this time, neither the common

⁹³ N.J. STAT. ANN. §§ 45:2B-42 to 75 (West 2022).

⁹⁴ N.J. STAT. ANN. § 45:2B-43 (West 2022).

⁹⁵ N.J. STAT. ANN. § 45:2B-44 (West 2022).

⁹⁶ N.J. STAT. ANN. § 45:2B-44 (“financial statements” is defined as “statements and related footnotes that purport to present an actual or a prospective financial position at a particular time, or results of operations, cash flow, or changes in financial position for a period of time, in conformity with generally accepted accounting principles or another comprehensive basis of accounting. The term includes specific elements, accounts or items of such statements, but does not include: incidental financial data included in management advisory service reports to support recommendations to a client; or tax returns and supporting schedules”).

⁹⁷ N.J. Law Revision Comm’n, *Minutes NJLRC Meeting*, at *3-4 (Jan. 23, 2020), www.njlrc.org (last visited Jan. 12, 2023) (“Commissioner Bunn . . . directed Staff to examine N.J.S. 45:2B-44, which contains definition of financial statements. . .”).

⁹⁸ *Id.* (setting forth definitions for terms “[a]s used in this act”); *see also State v. Lee*, No. 1 CA-CR 10-0305, 2012 WL 722985, at *7 (Ariz. Ct. App. Mar. 6, 2012) (“Defendant relies on the New Jersey definition of ‘financial statement’ that is contained in the New Jersey Accountancy Act of 1997. N.J.S.A. 45:2B-44. According to the plain language of that same statute, however, the provisions and definition therein apply solely to the Accountancy Act.”).

⁹⁹ The *Feuer* Court concluded that the term “books and records of account” “does not necessarily encompass all financial documents of a corporation,” and cited approvingly to decisions in other jurisdictions excluding “records of another corporation whose acquisition is contemplated” and “the proposed contract,” as well as “analyses or tentative studies” . . . ‘in the nature of confidential inter-office communications.’” *Feuer*, 455 N.J. Super. at 78-79. Conversely, many other jurisdictions have concluded that non-financial documents fall within the scope of the term. *See supra* at “Other State Statutes and Case Law.”

law nor the statutes in New Jersey clearly define the phrase “books and records of account.” The MBCA has incorporated a detailed and finite list of corporate records available for shareholder inspection. That list has not been adopted in New Jersey, and other states provide various interpretations of the language. The absence of a definition for this term has enabled New Jersey courts to tailor relief to shareholders who request inspection of corporate “books and records of account.”

In light of the foregoing, and the ongoing work of the CBLSC, Commission Staff requests guidance from the Commission regarding the direction of this project.