



NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report Addressing Meaning of Corporate “Books and Records of Account” in N.J.S. 14A:5-28

February 5, 2024

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **April 15, 2024**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Project Summary¹

The New Jersey Business Corporation Act (“Act”), 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” and a record of its shareholders.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 The phrase “books and records of account” is not defined in the Act.

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,” and found that “books and records of account consist of accounting or financial documents,” but do “not necessarily encompass all financial documents of a corporation.”⁶

Following the January 2023 Commission meeting, Staff confirmed that the New Jersey Corporate and Business Law Study Commission (“CBLSC”)⁷ is not actively working in this area.⁸ In addition, Staff received a letter from the New Jersey State Bar Association (“NJSBA”) “convey[ing the NJSBA’s] support for the [NJLRC]’s memorandum on Corporate Books and Records of Account.”⁹

Given that the CBLSC is not actively working in the area, and that the NJSBA has expressed support for the Commission’s continued work on this issue, proposed modifications to N.J.S. 14A:5-28 are set forth in the Appendix. The proposed modifications add language intended to provide additional guidance with respect to the meaning of the phrase “books and records of account” as used in N.J.S. 14A:5-28.

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 2023).

³ N.J. STAT. ANN. § 14A:5-28(1) (West 2023).

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, 78-79 (App. Div. 2018), *cert. granted* 236 N.J. 227, *aff’d* 238 N.J. 27.

⁷ See N.J. STAT. ANN. § 1:14-14(a) (West 2023) (“It shall be the duty of the commission to study and review all aspects of the statutes, legislation and decisions of the courts in this State and other states relating to business entities . . .”).

⁸ E-Mail from Todd Moore, Section Chief, Commerce, Labor and Industry Section, Office of Legislative Services, to Whitney G. Schlimbach, Re: New Jersey Law Revision Commission: Corporate Books and Records of Account in N.J.S. 14A:5-28 (May 24, 2023, 2:36 PM EST) (explaining that, to his understanding, “the commission is not currently active”) (on file with NJLRC).

⁹ Letter from Jeralyn Lawrence, President, NJSBA, to Laura Tharney, Executive Director, NJLRC (March 13, 2023) (“agree[ing] with the NJLRC that the statutory provision referenced therein be reviewed and revised for the reasons stated by NJLRC’s staff” and offering assistance going forward) (on file with NJLRC).

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.¹⁰

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

In 1968, the Legislature repealed extensive portions of the General Corporation Law of New Jersey in Title 14 and enacted the Business Corporation Act in Title 14A.¹¹ The new statutory scheme was developed by the Corporation Law Revision Commission (“CLRC”).¹² The work of the CLRC culminated in the issuance of a 1968 Report, which formed the basis for the bill enacted as Title 14A.¹³

In its Report, the CLRC noted that it “adopted, in spirit if not in letter,” many provisions of the Model Business Corporation Act (“MBCA” or “Model Act”),¹⁴ and “borrowed from the statutes of such leaders of corporate law as Delaware, New York and Illinois.”¹⁵ The CLRC also

¹⁰ N.J. STAT. ANN. § 14A:5-28 (emphasis added).

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

¹² 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).

The Corporation Law Revision Commission was created in 1958 and tasked with “moderniz[ing] corporation laws . . . to embody principles and procedures representing the best in modern American statutory law . . . [and] 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.” N.J. STAT. ANN. § 1:14-3 (1958) (expired Dec. 31, 1984).

¹³ 1968 CLRC Report, *supra* note 12.

¹⁴ See Committee on Corporate Laws, American Bar Foundation, Ed., *Model Business Corporation Act Annotated*, Vol. 2, §46 (1960) [hereinafter “1960 MBCA”].

¹⁵ 1968 CLRC Report, *supra* note 12, at iii-iv.

gave “[g]reat weight . . . to the existing statute law in New Jersey . . . and to the large body of case law in th[e] state.”¹⁶ Among the newly enacted statutes was N.J.S. 14A:5-28, which the CLRC based on Section 46 in the 1960 version of the MBCA, New York corporation law, and three repealed statutes in Title 14.¹⁷

Subsection (1) of N.J.S. 14A:5-28 was derived from all three sources: (1) repealed statute N.J.S. 14:5-1.1; (2) the first paragraph of Section 46 of the 1960 MBCA;¹⁸ and (3) §624 of New York’s Business Corporation Law.¹⁹ The CLRC indicated 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.”²⁰ That statute had required corporations to keep “transfer books [and] stock books” inside the state.²¹

N.J.S. 14A:5-28(2) provides that a shareholder is entitled to inspect certain corporate documents – “the balance sheet, the profit-and-loss statement and the surplus statement”²² – by submitting a written demand to the corporation.²³ The CLRC noted that subsection (2) was derived from the last sentence of Section 46 of the MBCA, which permitted a shareholder to access a corporation’s “most recent financial statements” after submitting a written demand.²⁴

Finally, the CLRC indicated that N.J.S. 14A:5-28(4) was based on the fourth paragraph of Section 46 of the 1960 MBCA.²⁵ As originally enacted, N.J.S. 14A:5-28(4) was practically identical to the language used in the 1960 MBCA.²⁶

¹⁶ *Id.* at iv.

¹⁷ *Id.* at 77 (citing to repealed statutes R.S. 14:1-3.1, R.S. 14:5-1 and R.S. 14:5-1.1).

¹⁸ The only difference between Section 46 and N.J.S. 14A:5-28(1) was the use of the phrase “correct and complete books and records of account,” which the New Jersey Legislature shortened to simply “books and records of account.” See 1960 MBCA, *supra* note 14, at 113.

¹⁹ 1968 CLRC Report, *supra* note 12, at 77 (“The last sentence of subsection 14A :5-28 (1) is taken from section 624 of the New York Act.”). See N.Y. BUS. CORP. LAW § 624 (McKinney) (“Any of the foregoing books, minutes or records may be in written form or in any other form capable of being converted into written form within a reasonable time.”).

²⁰ 1968 CLRC Report, *supra* note 12, at 77.

²¹ N.J. STAT. ANN. § 14:5-1.1 (repealed by L.1968, c. 350) (“The directors may keep the books of the corporation, except the stock and transfer books, outside of this state unless otherwise provided by the by-laws or certificate of incorporation.”).

²² 1968 CLRC Report, *supra* note 12, at 77.

²³ N.J. STAT. ANN. § 14A:5-28(2) (“Upon the written request of any shareholder, the corporation shall mail to such shareholder its balance sheet as at the end of the preceding fiscal year, and its profit and loss and surplus statement for such fiscal year.”).

²⁴ 1960 MBCA, *supra* note 14, at 114 (“Upon the written request of any shareholder of a corporation, the corporation shall mail to such shareholder its most recent financial statements showing in reasonable detail its assets and liabilities and the results of its operations.”).

²⁵ 1968 CLRC Report, *supra* note 12, at 77.

²⁶ S.B. 884, 1968 Leg., 193rd Sess. (1968). See also 1960 MBCA, *supra* note 14, 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 was not included in N.J.S. 14A:5-28(4)).

Although N.J.S. 14A:5-28 was subsequently amended in 1973,²⁷ 1988,²⁸ 2017,²⁹ and 2021,³⁰ 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.”

Model Business Corporation Act

Originally published in 1946 by the American Bar Association, the MBCA provides states with a modern body of statutory corporate law.³¹ Since its publication, the MBCA has been revised several times.³² As discussed *supra*, the 1960 MBCA was a significant influence on the development of Title 14A.³³ Until 1984, the Model Act addressed corporate records and shareholder inspection rights in a single provision, which provided the template for N.J.S. 14A:5-28.³⁴

1960 MBCA – 1984 MBCA

Pursuant to Section 46 of the 1960 MBCA, the three categories of documents that a corporation was required to maintain were “correct and complete books and records of account,” “minutes of the proceedings of its shareholders and board of directors,” and a “record of its shareholders,”³⁵ almost identical to the language of N.J.S. 14A:5-28(1).³⁶ Similarly, a shareholder with a “proper purpose” was permitted to inspect the “books and records of account, minutes, and

²⁷ 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.”).

²⁸ L.1988, c. 94, § 22, eff. Dec. 1, 1988 (requiring records to be kept in readable format, among other changes).

²⁹ 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).

³⁰ L.2021, c. 238, § 1, eff. Sept. 28, 2021 (“Permits corporations to use blockchain technology for certain recordkeeping requirements.”).

³¹ Wendell H. Holmes, *The Revised Model Business Corporation Act and Corporate Law Reform in Mississippi: Part One*, at 165, n.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.”).

³² *See e.g.* American Bar Association website: MBCA 2016 Revision and Prior Versions, available at <https://www.americanbar.org/groups/business_law/committees/corplaws/>.

³³ *See supra* at 3-4.

³⁴ 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”].

³⁵ *1960 MBCA, supra* note 14, at 113.

³⁶ N.J. STAT. ANN. § 14A:5-28(1).

record of shareholders of a corporation,”³⁷ which language is actually identical to subsection (4) of New Jersey’s statute.³⁸

1984 MBCA – 2016 MBCA

In its 1984 version (“1984 MBCA”), the relevant provision was divided into two sections, addressing required corporate records (Section 16.01) and shareholder inspection rights (Section 16.02) separately.³⁹ In addition, the phrase “books and records of account” no longer appeared in the Model Act beginning with the 1984 MBCA.⁴⁰ This formulation was maintained in subsequent versions of the MBCA, including the most recent version, issued in 2016 and updated through April 2023 (“2016 MBCA”).⁴¹

Section 16.01(a) of the 2016 MBCA lists seven categories of records that must be maintained by a corporation, including minutes of meetings of shareholders, board of directors and committees.⁴² In addition, subsections (b), (c), and (d) require a corporation to maintain “all annual financial statements” prepared in the previous three years, “accounting records,” and a “record of its current shareholders,” respectively.⁴³

Although New Jersey and the current Model Act diverge with respect to the list of documents in Section 16.01(a) of the 2016 MBCA, much of the remaining language is similar.⁴⁴ The 2016 MBCA still requires a corporation to maintain “minutes of the proceedings of its shareholders, board and executive committee” and “a record or records containing the names and addresses of all shareholders,” as does N.J.S. 14A:5-28(1).⁴⁵ The third category of documents that

³⁷ 1960 MBCA, *supra* note 14, at 114.

³⁸ N.J. STAT. ANN. § 14A:5-28(4).

³⁹ 1984 MBCA, *supra* note 34, at 1710-11, 1718.1-20.

⁴⁰ In the Annotation to Section 16.01, the 1984 MBCA uses the term “accounting records” interchangeably with the phrases “books and records of account” and “books of account.” 1984 MBCA, *supra* note 34, at 1716-17 (“Statutory Comparison”).

⁴¹ American Bar Association, *Model Business Corporation Act (2016 Revision)* (Dec. 9, 2017) [hereinafter “2016 MBCA”]. There are no changes to the relevant sections between 2016 and 2023, but citations in this report are to the 2023 update of the 2016 revision. *Model Business Corporation Act (updated through April 28, 2023)*, available at <https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/mbca-202304.pdf>.

⁴² *Id.* at *361 (“(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 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.”).

⁴³ *Id.* at *361-62 (Section 16.01(b)-(d)).

⁴⁴ N.J. STAT. ANN. § 14A:5-28(1).

⁴⁵ *Id.*

New Jersey requires is “books and records of account,” while the 2016 MBCA additionally requires maintenance of “financial statements” and “accounting records.”⁴⁶

Section 16.02 of the 2016 MBCA, governing shareholder inspection rights, provides that any shareholder who gives timely written notice is entitled to inspect the records listed in section 16.01(a), except for minutes of board of directors and committee meetings.⁴⁷ In addition, a shareholder who makes a demand “in good faith and for a proper purpose”⁴⁸ is entitled to inspect the records in subsections (b) through (d), as well as “excerpts from minutes” of board of director’s and committee meetings.⁴⁹

With respect to shareholder inspection, N.J.S. 14A:5-28 provides for three levels of inspection in subsections (2), (3) and (4).⁵⁰ Pursuant to subsection (2), shareholders may request the corporation’s “balance sheet as at the end of the preceding fiscal year, and its profit and loss and surplus statement for such fiscal year.”⁵¹ The parallel provision in Section 46 of the 1960 MBCA permitted a shareholder to request a corporation’s “most recent financial statements showing in reasonable detail its assets and liabilities and the results of its operations.”⁵² The 2016 MBCA allows a shareholder to access the corporation’s “annual financial statements for the most recent fiscal year” in Section 16.20.⁵³

Pursuant to N.J.S. 14A:5-28(3), certain qualifying shareholders may inspect the minutes of shareholder meetings and the record of shareholders “for any proper purpose.”⁵⁴ In the 2016 MBCA, the minutes of shareholder meetings are included among the documents and records in Section 16.01(a) that a shareholder may inspect upon written demand, pursuant to Section

⁴⁶ 2016 MBCA, *supra* note 41, at *361.

⁴⁷ *Id.* at *364 (“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”).

⁴⁸ *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”).

⁴⁹ *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).”).

⁵⁰ N.J. STAT. ANN. § 14A:5-28. *See supra* at 4-5.

⁵¹ N.J. STAT. ANN. § 14A:5-28(2).

⁵² 1960 MBCA, *supra* note 14, at 114.

⁵³ 2016 MBCA, *supra* note 41, at *369-70.

⁵⁴ N.J. STAT. ANN. § 14A:5-28(3) (“[a]ny person who shall have been a shareholder of record of a corporation for at least six months immediately preceding his demand, or any person holding, or so authorized in writing by the holders of, at least 5% of the outstanding shares of any class or series, upon at least five days’ written demand shall have the right for any proper purpose to examine . . .”).

16.02(a).⁵⁵ Section 16.02(a) does not contain any restrictions with regard to which shareholders may request inspection under that section.⁵⁶

Finally, subsection (4) of New Jersey’s statute permits shareholders who have demonstrated a proper purpose to inspect “books and records of account, minutes, and [the] record of shareholders.”⁵⁷ The 2016 MBCA allows inspection of three years of “financial statements,” “accounting records,” “excerpts” of minutes of board of directors and committee meetings, and the “the record of shareholders” by a shareholder with a “proper purpose” and acting in “good faith.”⁵⁸

The 1984 and the 2016 MBCA specified that a corporation must only provide excerpts of minutes that are “relevant” or “directly connected with the shareholder’s purpose.”⁵⁹ As discussed *infra*, the *Cain* Court, after concluding that the “minutes” referred to in N.J.S. 14A:5-28(4) include those of board of directors and committee meetings, reiterated that the “scope of records a shareholder may examine under subsection (4) is limited to those . . . which are pertinent to the shareholder's proper purpose.”⁶⁰

The 2016 MBCA does not define “financial statements” or “accounting records,” just as New Jersey does not define “books and records of account.”⁶¹ The Official Comment to Section 16.01 indicates that “financial statements . . . are those that the corporation prepares in the operation of its business, including in response to third party requirements.”⁶² The Model Act simply provides that the “accounting records” requirement “depend[s] upon the form of the corporation’s financial statements.”⁶³ The 1984 MBCA required only “appropriate accounting

⁵⁵ 2016 MBCA, *supra* note 41, at *361 (Section 16.01(a)(5)).

⁵⁶ *Id.* at *364 (“A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation’s principal office, any of the records of the corporation described in section 16.01(a), excluding minutes of [board of directors and committee meetings] if the shareholder gives the corporation a signed written notice of the shareholder’s demand at least five business days before the date on which the shareholder wishes to inspect and copy”).

⁵⁷ N.J. STAT. ANN. § 14A:5-28(4) (“Nothing herein contained shall impair the power of any court, upon proof by a shareholder of proper purpose” to order inspection).

⁵⁸ 2016 MBCA, *supra* note 41, at *364 (Sections 16.02(b) – (c)) (allowing inspection of records in subsection (b) by shareholders if “shareholder’s demand is [1] made in good faith and for a proper purpose; (2) [it] describes with reasonable particularity the shareholder’s purpose and the records the shareholder desires to inspect; and (3) the records are directly connected with the shareholder’s purpose”).

⁵⁹ 1984 MBCA, *supra* note 34, at 1721 (“The corporation is required to make available only relevant excerpts of minutes and need not make available minutes of entire meetings merely because a portion of the minutes is directly connected with the shareholder’s purpose.”); 2016 MBCA, *supra* note 41, at *366 (“a shareholder is entitled to inspect only excerpts of meetings of, and records of written actions taken by, the board of directors and board committees related to the purpose of the inspection”).

⁶⁰ *Cain v. Merck & Co.*, 415 N.J. Super. 319, 334 (App. Div. 2010); *see also infra* at note 93.

⁶¹ The 1984 MBCA required only that corporation maintain “appropriate accounting records,” which, as noted *infra* at note 40, was a term used interchangeably with the phrase “books and records of account.” 1984 MBCA, *supra* note 34, at 1712.

⁶² 2016 MBCA, *supra* note 41, at *363.

⁶³ *Id.*

records,” which were described as “records that permit financial statements to be prepared which fairly present the financial position and transactions of the corporation.”⁶⁴

Although New Jersey has not adopted the post-1984 version of the MBCA, the New Jersey statute and the 2016 MBCA align with respect to the broad categories of documents to be maintained by the corporation, and that are available for shareholder inspection. As discussed below, judicial interpretation of the phrase “books and records of account,” in New Jersey and in other states, includes “financial statements,” “accounting records” and other documents and records similar to these terms, as described by the MBCA.

New Jersey Case Law

There are very few decisions addressing the specific books and records that a shareholder is entitled to inspect pursuant to either N.J.S. 14A:5-28 or the common law right of inspection.⁶⁵ Many of those decisions only determine that a shareholder has not demonstrated a “proper purpose.”⁶⁶ Instead, courts have provided general descriptions of the types of documents and records that a shareholder has been permitted to inspect,⁶⁷ or emphasized that the right of

⁶⁴ 1984 MBCA, *supra* note 34, at 1712.

⁶⁵ *Lanza v. New Glob. Commc'ns, Inc.*, 2005 WL 2759215, at *3 (N.J. Super. Ct. Ch. Div. Oct. 21, 2005) (noting a prior order “to turn over all books and records in defendants' possession, or under their custody or contract, . . . and . . . to provide plaintiffs with copies of all corporate documents . . . , including but not limited to by-laws, minutes of meetings, notices of meetings, corporate resolutions, share transfer records, correspondence, consents, the Certificate of Incorporation, any amendments to the Certificate or Incorporation and any other corporate documents maintained by the corporation”); *Kemp v. Sloss-Sheffield Steel & Iron Co.*, 128 N.J.L. 322, 322 (Sup. Ct. 1942) (allowing inspection of “the books of account, records, contracts, federal reports, and other data of the respondent corporation as to the assets, liabilities, contracts, operations and practices and the administration of the affairs of the corporation”); *Garcin v. Trenton Rubber Mfg. Co.*, 60 A. 1098, 1098-99 (N.J. Sup. Ct. 1905) (granting inspection of “the ledger, the cashbook, the checkbook, the bills-payable book, the invoice book, and the salesbook; but not the books in which secret compounds of manufacture are kept”).

⁶⁶ *Bruning v. Hoboken Printing & Publ'g Co.*, 67 N.J.L. 119, 120 (Sup. Ct. 1902) (“The right [of inspection] is not to be given to gratify curiosity, or for speculative purposes, but only when its exercise is sought in good faith, and for a specific purpose.”). *See e.g. City of Birmingham Relief & Ret. Sys. v. ExxonMobil Corp.*, 2019 WL 1986543, at *4 (N.J. Super. Ct. App. Div. May 6, 2019) (affirming “that plaintiff failed to establish proof of a proper purpose to support its inspection request” under N.J.S. 14A:5-28); *Siena v. Grand Lodge of State of N.J., Ord. Sons of Italy in Am.*, 11 N.J. Super. 507, 518 (App. Div. 1951) (denying inspection request because “plaintiff did not make his application in good faith”); *Fulle v. White Metal Mfg. Co.*, 180 A. 231, 232 (N.J. Sup. Ct. 1935) (finding “[t]he motive behind this action appears to be animus engendered by separation from a large salary” and denying the application for inspection).

⁶⁷ *City of Roseville Employees' Ret. Sys. on Behalf of Kid Brands Inc. v. Kid Brands*, 2012 WL 12906489, at *4 & *7 (D.N.J. Nov. 8, 2012) (finding the shareholder entitled to only those records “directly related to its allegations made in the underlying Complaint” and concluding the phrase “of account” does not “limit[] the stockholder's right to accounting reports”); *Rosenbaum v. Holthausen*, 9 N.J. Super. 484, 484–85 (Ch. Div. 1950) (differentiating between “books of account and of the stock books and stock transfer books” of a corporation); *Wyckoff v. Hardware Supply Co.*, 134 N.J.L. 172, 173–74 (Sup. Ct. 1946) (concluding that “a common stockholder has the right of inspection of the books and records of a corporation . . . to ascertain the value of his shareholdings for the purpose of sale”); *Drake v. Newton Amusement Corp.*, 123 N.J.L. 560, 561 (Sup. Ct. 1939) (permitting inspection based on the plaintiff's assertion that shareholders have a “right to verify the contents of [reports and financial] statements [submitted to relators]”).

inspection allows shareholders to protect their interests by “determining whether there has been proper management,” and ascertaining the financial condition of the corporation.⁶⁸

The decision in *Feuer v. Merck & Co., Inc.*, which brought this issue to the attention of the Commission, appears to be the only New Jersey decision expressly interpreting the meaning of the statutory phrase “books and records of account.”⁶⁹ Another New Jersey decision, *Cain v. Merck & Co.*, provided clarification of the term “minutes,” as used in N.J.S. 14A:5-28(4).⁷⁰

Feuer v. Merck & Co., Inc.

In *Feuer*, a Merck shareholder (“Plaintiff”) brought an action to compel the production of documents related to the activities of a “Working Group” that was appointed by Merck’s board of directors to evaluate Plaintiff’s demand that the board of directors commence suit against itself and the corporation.⁷¹ 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.⁷² Plaintiff’s inspection demand was “refused.”⁷³

The Appellate Division noted that the phrase “books and records of account” appears in N.J.S. 14A:5-28(1), which “describes the corporation’s record-keeping obligation” and N.J.S. 14A:5-28(4), addressing shareholder inspection.⁷⁴ The *Feuer* Court “presume[d] the phrase means the same in both subsections absent a clear indication to the contrary.”⁷⁵ It concluded, therefore, that “expansively defin[ing] the universe of documents subject to inspection under [N.J.S. 14A:5-28(4)]” would require a corporation to maintain the same broad “universe of documents.”⁷⁶ The Court found that N.J.S. 14A:5-28 “does not impose such a vaguely defined record-keeping obligation on corporations, nor does it grant courts the power to grant an equally vague scope of inspection to shareholders.”⁷⁷

⁶⁸ *Wyckoff*, 134 N.J.L. at 174; see also *Szeman v. Capitol Theater*, 127 A. 325, 326 (N.J. Sup. Ct. 1925) (permitting inspection “so that [the corporation’s] financial situation may be ascertained”); *Feick v. Hill Bread Co.*, 91 N.J.L. 486, 490 (Sup. Ct. 1918), *aff’d*, 92 N.J.L. 513 (1919) (“upon an examination of the books, that the annual reports made by the company were inaccurate and did not truly represent the business affairs and condition of the company, and hence the present value of the stock would be more or less affected”); *Huyler v. Cragin Cattle Co.*, 40 N.J. Eq. 392, 398 (Ch. 1885) (finding shareholders were “entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers [because] such a right is necessary to their protection”), *rev’d sub nom. Huyler v. Cragin Cattle Co.*, 42 N.J. Eq. 139 (Ch. 1887).

⁶⁹ *Feuer*, 455 N.J. Super. at 73.

⁷⁰ *Cain*, 415 N.J. Super. at 334.

⁷¹ *Feuer*, 455 N.J. Super. at 73.

⁷² *Id.* at 73.

⁷³ *Id.* at 75. Plaintiff appealed the trial court’s holding that “the documents [Plaintiff] sought fell outside ‘books and records of account,’ and the common law did not expand the statutory inspection right.” *Id.*

⁷⁴ *Id.* at 79.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

With respect to the definition of “books and records of account,” the Court cited approvingly the “common meaning” of the phrase set forth in Black’s Law Dictionary, which “equat[es] ‘books of account’ with ‘shop books’ which are ‘[r]ecords of original entry maintained in the usual course of a business . . . ’.”⁷⁸

In addition, the *Feuer* Court referred to an Alaska Supreme Court decision, *Pederson v. Arctic Slope Regional Corp.*,⁷⁹ which interpreted the phrase “books and records of account” as used in Alaska’s corporate shareholder inspection statute.⁸⁰ The Court agreed that “‘books and records of account’ consist of accounting or financial documents,” and noted that the Alaska Supreme Court “include[d] detailed accounting and executive compensation records” in its definition of the term.⁸¹

However, the *Feuer* Court also found that the phrase “does not encompass any and all records, books, and documents of a corporation,” nor even “all financial documents of a corporation.”⁸² The Court cited cases from Pennsylvania, Missouri, and Wisconsin, in which the courts found that certain documents and records did not fall within the scope of the phrase.⁸³

Finding that the documents sought by Plaintiff were largely “documents the corporation generated as it considered and rejected his [initial] demand” of a lawsuit, the Court found his request was “one significant step removed from a shareholders’ demand for documents prepared in the usual course pertaining to the corporation’s management or suspected mismanagement.”⁸⁴

Therefore, the *Feuer* Court held that Plaintiff’s demand “exceed[ed] the scope of inspection that the statute authorizes.”⁸⁵

Cain v. Merck & Co.

In *Cain*, the Appellate Division analyzed the scope of the word “minutes” in N.J.S. 14A:5-

⁷⁸ *Id.* (quoting *Black’s Law Dictionary* 207, 1504 (9th ed. 2009)).

⁷⁹ *Pederson v. Arctic Slope Reg’l Corp.*, 331 P.3d 384 (Alaska 2014).

⁸⁰ As set forth *infra* at 96, Alaska’s shareholder inspection statute is very similar in structure and language to N.J.S. 14A:5-28. See ALASKA STAT. ANN. § 10.06.430 (West 2023).

⁸¹ *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.”)).

⁸² *Id.* at 78-79.

⁸³ See *Susquehanna Corp. v. Gen’l Refractories Co.*, 250 F. Supp. 797, 800–01 (E.D. Pa.) (excluding “records of another corporation whose acquisition is contemplated” and “the proposed contract”), *aff’d in part, rev’d in part*, 356 F.2d 985 (3d Cir. 1966); *State ex rel. Jones v. Ralston Purina Co.*, 358 S.W.2d 772, 778 (Mo. 1962) (excluding “analyses or tentative studies . . . in the nature of confidential inter-office communications”); and *Bitters v. Milcut, Inc.*, 117 Wis. 2d 48, 53 (Ct. App. 1983) (excluding “interim profit and loss statements”).

⁸⁴ *Feuer*, 455 N.J. Super. at 89.

⁸⁵ *Id.* at 83.

28(4).⁸⁶ Two shareholders asserted their right to inspect corporate records, including minutes of specified “Board of Directors and Executive Committee” meetings, related to “corporate mismanagement and wrongdoing in connection with the failure to make a timely disclosure of the results of a clinical trial of a cholesterol-lowering drug.”⁸⁷

To determine whether the word “minutes” in subsection (4) includes minutes of board of directors and committee proceedings, the *Cain* court analyzed its use in the rest of N.J.S. 14A:5-28.⁸⁸ Subsection (1) requires a corporation to maintain “minutes of the proceedings of its shareholders, board and executive committee.”⁸⁹ Subsection (3) permits inspection of the minutes of shareholder proceedings.⁹⁰ In subsection (4), however, the word “minutes” is “unqualified.”⁹¹

The *Cain* Court employed “the general rule of statutory construction that ‘where the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.’”⁹² Therefore, because the type of minutes available for inspection is specified in subsection (3), the Court “construe[d] the reference to ‘minutes’ in subsection (4) to refer to the shareholder, board, and executive committee minutes referred to in subsection (1).”⁹³

Other State Statutes and Common Law

Like New Jersey, most state statutes are aligned with some version of the MBCA’s provision(s) addressing corporate records and shareholder inspection rights.⁹⁴ A majority of states and the District of Columbia have adopted a post-1984 MBCA list of records that a corporation must maintain and a shareholder may inspect in different circumstances.⁹⁵ There are nine states

⁸⁶ *Cain*, 415 N.J. Super. at 323. See also N.J. STAT. ANN. § 14A:5-28(4) (allowing shareholder with a proper purpose to inspect “the books and records of account, minutes, and record of shareholders of a corporation”) (emphasis added).

⁸⁷ *Cain*, 415 N.J. Super. at 334.

⁸⁸ *Id.* at 331.

⁸⁹ N.J. STAT. ANN. § 14A:5-28(1).

⁹⁰ N.J. STAT. ANN. § 14A:5-28(3) (“[a]ny person who shall have been a shareholder of record of a corporation for at least six months immediately preceding his demand, or any person holding, or so authorized in writing by the holders of, at least 5% of the outstanding shares of any class or series, upon at least five days’ written demand shall have the right for any proper purpose to examine . . . its minutes of the proceedings of its shareholders and record of shareholders”).

⁹¹ *Cain*, 415 N.J. Super. at 330.

⁹² *Id.* at 331.

⁹³ *Id.* (reiterating also that “[t]he scope of records a shareholder may examine under subsection (4) is limited to those identified in the statute which are pertinent to the shareholder’s proper purpose for the investigation”).

⁹⁴ See e.g. American Bar Association website: MBCA Enactment Map (as of Feb. 1, 2024), available at <https://www.americanbar.org/groups/business_law/committees/corplaws/>.

⁹⁵ D.C. CODE § 29-313.02(b) (West 2023); ALA. CODE § 10A-2A-16.02(b) (West 2023); ARIZ. REV. STAT. ANN. § 10-1602(B) (West 2023); ARK. CODE ANN. § 4-27-1602(b) (West 2023); COLO. REV. STAT. § 7-116-102(2) (West 2023); CONN. GEN. STAT. ANN. § 33-946(c) (West 2023); FLA. STAT. ANN. § 607.1602; GA. CODE ANN. § 14-2-1602(c) (West 2023); IDAHO CODE ANN. § 30-29-1602(b) (West 2023); IND. CODE § 23-1-52-2(b) (West 2023); IOWA CODE ANN. § 490.1602(2) (West 2023); KY. REV. STAT. ANN. § 271B.16-020(2) (West 2023); ME. REV. STAT. ANN. TIT. 13-C, § 1602(3) (West 2023); MASS. GEN. LAWS ANN. CH. 156, § 16.02(b) (West 2023); MISS. CODE ANN. § 79-4-16.02(b) (West 2023); MONT. CODE ANN. § 35-14-1602(2) (West 2023); NEB. REV. STAT. § 21-2-2,222(c) (West 2023); N.H. REV. STAT. ANN. § 293-A:16.02(c) (West 2023); N.C. GEN. STAT. ANN. § 55-16-02(b) (West 2023); OR.

that, like New Jersey, have codified a pre-1984 version of the MBCA to permit the inspection of “books and records of account.”⁹⁶ Other states have developed their own lists of records available for inspection by shareholders.⁹⁷

There are only two states with statutes providing a definition of “books and records of account.” In Hawaii, the statute states that “[t]he books and records of account shall include accounts of the corporation’s assets, liabilities, receipts, disbursements, gains, and losses.”⁹⁸ The Missouri statute provides that “[e]ach corporation shall keep correct and complete books and records of account, including the amount of its assets and liabilities.”⁹⁹

Of the statutes with similar language to N.J.S.14A:5-28, the *Feuer* Court cited, with approval, decisions in Alaska, Missouri, and Pennsylvania¹⁰⁰ that analyzed the scope of the phrase “books and records of account.”¹⁰¹ In addition, the New Jersey Legislature has expressly relied on

REV. STAT. ANN. § 60.774(2) (West 2023); S.C. CODE ANN. § 33-16-102(b) (West 2023); S.D. CODIFIED LAWS § 47-1A-1602.1 (West 2023); TENN. CODE ANN. § 48-26-102(b) (West 2023); UTAH CODE ANN. § 16-10a-1602(2) (West 2023); VT. STAT. ANN. TIT. 11A, § 16.02(b) (West 2023); VA. CODE ANN. § 13.1-771(C) (West 2023); WASH. REV. CODE § 23B.16.020(2) (West 2023); W. VA. CODE ANN. § 31D-16-1602(b) (West 2023); WIS. STAT. ANN. § 180.1602(2)(a) (West 2023); WYO. STAT. ANN. § 17-16-1602(b) (West 2023).

⁹⁶ ALASKA STAT. ANN. § 10.06.430 (West 2023); ARK. CODE ANN. § 4-26-715 (West 2023); 805 Ill. Comp. Stat. Ann. 5/7.75 (West 2023); MO. REV. STAT. § 351.215 (West 2023); N.M. STAT. ANN. § 53-11-50 (West 2023); N.Y. BUS. CORP. LAW § 624 (McKinney 2024); OHIO REV. CODE ANN. § 1701.37 (West 2023); 15 PA. CONS. STAT. § 1508 (West 2023); R.I. GEN. LAWS § 7-1.2-1502 (West 2023).

⁹⁷ CAL. CORP. CODE § 1601(a)(1) (West 2023); DEL. CODE ANN. TIT. 8, § 220(b) (West 2023); HAW. REV. STAT. ANN. § 414-470(a) (West 2023); KAN. STAT. ANN. § 17-6510(b) (West 2023); LA. REV. STAT. ANN. § 12:1-1602(C) (West 2023); MD. CODE ANN., CORPS. & ASS'NS § 2-512(a) (West 2023); MICH. COMP. LAWS ANN. § 450.1487(2) (West 2023); MINN. STAT. ANN. § 302A.461(2)-(4) (West 2023); NEV. REV. STAT. § 78.257(1)-(2) (West 2023); N.D. CENT. CODE ANN. § 10-19.1-84(2)-(4) (West 2023); OKLA. STAT. ANN. TIT. 18, § 1065(B) (West 2023); TEX. BUS. ORGS. CODE ANN. § 21.218(b) (West 2023).

⁹⁸ HAW. REV. STAT. ANN. § 414-470(a).

⁹⁹ MO. REV. STAT. § 351.215(1).

¹⁰⁰ See *Feuer*, 455 N.J. Super. at 78-79. See *supra* at 11.

¹⁰¹ *Pederson*, 331 P.3d at 387 (including “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” within the scope of the phrase “books and records of account” as used in Alaska Stat. Ann. § 10.06.430); *Ralston Purina Co.*, 358 S.W.2d at 778 (“analyses or tentative studies prepared purely for the information of the management . . . being in the nature of confidential inter-office communications, were not comprehended within the meaning of ‘books’ as that term is used in the statute.”); *Susquehanna Corp.*, 250 F. Supp. at 800–01 (excluding “the records of another corporation whose acquisition is contemplated” and “the proposed contract” from the scope of 15 Pa. Stat. and Cons. Stat. Ann. § 1508(b)). See also *State ex rel. Brown v. III Invs., Inc.*, 80 S.W.3d 855, 860 (Mo. Ct. App. 2002) (“‘books’ of the company . . . does not extend to documents . . . like confidential inter-office communications containing internal analysis or tentative studies prepared for the information of management”); *Ginsburg v. Redmond Finishing Co.*, 8 Pa. D. & C.3d 756, 757 (Pa. Com. Pl. 1978) (allowing inspection of “contracts of defendant relating to sale or purchase of assets, raw materials and sale production of goods and materials [and] books and records relating to attempts to resolve or compromise corporate tax liens, and . . . showing dividends declared or paid”) and *Reilly v. Coppertech, Inc.*, 19 Pa. D. & C.3d 349, 351 (Pa. Com. Pl. 1981) (holding a shareholder “has the right to see the original records,” including “cash receipts and disbursements, accounts receivable and payable ledgers, financial reports, checkbooks, books of original entry, bank reconciliations and Federal and state tax returns”).

the statutory law of Illinois¹⁰² and New York¹⁰³ in developing its own statutory language.¹⁰⁴ Finally, in an additional two jurisdictions with statutes similar to New Jersey – Arkansas and Ohio – courts have issued decisions specifying that certain types of corporate records fall within the scope of “books and records of account.”¹⁰⁵

Among the materials held to fall within the scope of the phrase “books and records” in these states and New Jersey, the documents and records most commonly identified are related to the financial situation of the corporation, including information related to a corporation’s assets, liabilities, expenses, disbursements, and income.¹⁰⁶ Most states include some form of financial statements or accounting reports or ledgers within the scope of a shareholder’s right to inspect corporate books and records.¹⁰⁷

The aforementioned states have also provided that payroll information, including executive compensation information,¹⁰⁸ may be made available to shareholders.¹⁰⁹ Another category of record frequently made available for inspection are contracts, although Arkansas and Pennsylvania disagree on whether proposed contracts or offers to contract are open to inspection.¹¹⁰

Other Sources

In addition to the MBCA and cases interpreting the phrase “books and records of account,” there are two unrelated sources that provide guidance regarding the records and documents that

¹⁰² *Weigel v. O'Connor*, 57 Ill. App. 3d 1017, 1021-22 (1978) (allowing inspection of “television logs, contracts with advertisers, and reports that the corporation . . . filed with the Federal Communications Commission”); *Corwin v. Abbott Lab'ys*, 353 Ill. App. 3d 848, 850-52 (2004) (permitting inspection of “internal investigatory reports and any and all ‘document[s] received by any’ board member . . . relating to the federal investigation” of the corporation’s subsidiary”).

¹⁰³ *Beryl v. U.S. Smelting Ref. & Min. Co.*, 228 N.Y.S.2d 394, 396-97 (Sup. Ct. 1962) (allowing inspection of “(1) minute and stock record books; (2) general ledger; (3) books of original entry, including journals and cash books; (4) payroll ledgers; and (5) books of account”).

¹⁰⁴ See 1968 CLRC Report, *supra* note 12, at iii-iv (“borrow[ing] from the statutes of such leaders of corporate law as Delaware, New York and Illinois” when developing Title 14A).

¹⁰⁵ *Ashley Bancstock Co. v. Meredith*, 2017 Ark. App. 598, 11 (2017) (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”); *No-Burn, Inc. v. Murati*, 2011-Ohio-5635, ¶ 35 (Nov. 2, 2011) (concluding records that “provide a picture of the general financial condition of the corporation” include “[g]eneral and payroll ledgers, bank statements, financial statements and supporting memoranda from accountants, corporate investments, general expense reports, personnel expense records, owner/officer/related entity expense records, travel expense records, and owner/officer/employee reimbursement reports [and c]ontracts (employment, consulting, transactional, leases, guarantees, loans) and offers to contract (loan applications) provide a picture of management’s utilization of corporate resources and willingness to assume risks”).

¹⁰⁶ See *supra* notes 65, 67, 101, 103 & 105.

¹⁰⁷ See *id.*

¹⁰⁸ See *supra* note 101. See also *Pederson*, 331 P.3d at 398 n.34 (noting that that five other states have “interpreted their inspection rights to run to individual executive compensation information”: Delaware, Illinois, North Carolina, Oregon, and Pennsylvania).

¹⁰⁹ See *supra* notes 103 & 105.

¹¹⁰ See *supra* notes 65, 83, 101, 102 & 105.

should be maintained by a corporation. These sources provide more context for the potential scope of the phrase “books and records of account” in terms of shareholder inspection rights.

N.J.S. 45:2B-44 in the Accountancy Act

N.J.S. 45:2B-44, which defines “financial statements” and other terms, is found in the New Jersey Accountancy Act of 1997.¹¹¹ Although the definitions contained in N.J.S. 45:2B-44 are explicitly applicable only to the Accountancy Act,¹¹² the definition provides general context for the meaning of the phrase “financial statements,” which some states,¹¹³ and the current MBCA,¹¹⁴ include as among records available for shareholder inspection.

The Accountancy Act defines the term to include “statements and related footnotes that purport to present an actual or prospective financial position at a particular time, or results of operations, cash flow, or changes in financial position for a period time, in conformity with generally accepted accounting principles^[115] or another comprehensive basis of accounting.”¹¹⁶

IRS Guidelines

The Internal Revenue Service (“IRS”) publishes and updates a document entitled “Starting a Business and Keeping Records,” which contains a section on “Recordkeeping.”¹¹⁷ The IRS notes

¹¹¹ N.J. STAT. ANN. §§ 45:2B-42 to 75 (West 2023).

¹¹² *Id.* (setting forth definitions for terms “[a]s used in this act”); *see also State v. Lee*, 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.”).

¹¹³ *See supra* at notes 101 & 105.

¹¹⁴ 2016 MBCA, *supra* note 41, at *361.

¹¹⁵ The phrase “generally accepted accounting principles” (GAAP) references the “financial accounting and reporting” guidelines issued by the Financial Accounting Standards Board (FASB). *See* Financial Accounting Standards Board website, available at <<https://www.fasb.org>> (“Established in 1973, the Financial Accounting Standards Board (FASB) is the independent, private- sector, not-for-profit organization based in Norwalk, Connecticut, that establishes financial accounting and reporting standards for public and private companies and not-for-profit organizations that follow Generally Accepted Accounting Principles (GAAP).”). The FASB issues “Concept Statements,” which are “intended to serve the public interest by setting the objectives, qualitative characteristics, and other concepts that guide selection of economic phenomena to be recognized and measured for financial reporting and their display in financial statements or related means of communicating information to those who are interested” but do “not establish generally accepted accounting standards.” *Id.* In its most recent Concepts Statement addressing “Elements of Financial Statements,” the FASB lists the following “elements”: “a. Assets b. Liabilities c. Equity (net assets) d. Investments by owners e. Distributions to owners f. Comprehensive income g. Revenues h. Expenses i. Gains j. Losses.” Financial Accounting Standards Board, *Conceptual Framework for Financial Reporting: Chapter 4, Elements of Financial Statements*, “Statement of Financial Accounting Concepts No. 8”, at 1 (Dec. 2021) (explaining that “[d]efinitions of elements of financial statements are a significant determinant of the content of financial statements”), available at <<http://tinyurl.com/ysabmv52>>.

¹¹⁶ N.J. STAT. ANN. § 45:2B-44 (West 2023).

¹¹⁷ Department of the Treasury, Internal Revenue Service, “Starting a Business and Keeping Records,” Publication 583 (Rev. January 2021) [hereinafter “IRS Publication 583”], available at <<https://www.irs.gov/pub/irs-pdf/p583.pdf>>. *See also* Michael J. Faul, Jr. and Robert Dipasquale, “A Minority Shareholder's Inspection Rights Under N.J.S.A. 14a:5-28,” *New Jersey Lawyer, The Magazine*, 204-AUG N.J. Law. 8, at 11–12 (Aug. 2000) (“The Internal Revenue Code (IRC) offers general guidance regarding categories of books and records to be maintained by

that, “[e]xcept in a few cases, the law does not require any specific kind of records.”¹¹⁸

The publication advises that a taxpayer “can choose any recordkeeping system suited to [the] business that clearly shows [the business’s] income and expenses.”¹¹⁹ The publication does state, however, that the “recordkeeping system should include a summary of [the] business transactions[, which] is ordinarily made in [the] books (for example, accounting journals and ledgers).”¹²⁰ Additionally, the IRS advises taxpayers to maintain “supporting documents” of the following: “[g]ross receipts”; “[i]nventory”; “[e]xpenses”; and “[a]ssets.”¹²¹

Pending Bills

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

Conclusion

There are various sources that offer guidance when analyzing the scope of the phrase “books and records of account,” in the context of New Jersey’s shareholder inspection statute. These include: prior and current versions of the MBCA, the legislative history of N.J.S. 14A:5-28 and Title 14A, New Jersey’s own common law, and other state statutes and the decisions interpreting them.

The proposed modifications set forth in the Appendix are derived from the common elements of these different sources. They are intended to provide guidance regarding the scope of the phrase “books and records of account” as used in N.J.S. 14A:5-28.

taxpayers. For example, I.R.C. Section 6001 requires taxpayers other than wage earners and farmers to keep “permanent books of accounts or records including inventories sufficient to establish gross income, deductions, credits and other amounts required to be shown on any tax return or information return.”)

¹¹⁸ *IRS Publication 583, supra* note 117, at 13 (“Business transactions are ordinarily summarized in books called journals and ledgers.”).

¹¹⁹ *Id.*

¹²⁰ *Id.* (noting also that “[a] corporation should keep minutes of board of directors’ meetings”).

¹²¹ *Id.* at 12-13 (emphasis added). *See also* A Minority Shareholder's Inspection Rights Under N.J.S.A. 14a:5-28, 204-AUG N.J. Law. at 12 (listing the following as typical books and records normally maintained by companies in the ordinary course of business”: “[g]eneral ledger . . . [c]ash receipts journals . . . [s]ales journal . . . [c]ash disbursements journals . . . [p]urchase journal . . . [i]nventory journal . . . [p]ayroll journal . . . [and a]ccounts receivable journal”).

APPENDIX

The proposed modifications are shown on the following pages with underlining – the language shown below with *underlining and italics* is language on which guidance is sought as explained in the Comment below.

N.J.S. 14A:5-28. Books and records; right of inspection; limitations or conditions on use or distribution of requested materials

Books and records; right of inspection.

(1) Each corporation shall keep books and records of account and minutes of the proceedings of its shareholders, board and executive committee, if any. Unless otherwise provided in the bylaws, such books, records and minutes may be kept outside this State. The corporation shall keep at its principal office, its registered office, at the office of its transfer agent, or on an electronic network, a record or records containing the names and addresses of all shareholders, the number, class and series of shares held by each and the dates when they respectively became the owners of record thereof. Any of the foregoing books, minutes or records may be in written form or in any other form capable of being converted into readable form within a reasonable time, including on an electronic network. A corporation shall convert into readable form without charge any such records not in such form, upon the written request of any person entitled to inspect them.

(2) Upon the written request of any shareholder, the corporation shall mail to such shareholder its balance sheet as at the end of the preceding fiscal year, and its profit and loss and surplus statement for such fiscal year.

(3) Any person who shall have been a shareholder of record of a corporation for at least six months immediately preceding his demand, or any person holding, or so authorized in writing by the holders of, at least 5% of the outstanding shares of any class or series, upon at least five days' written demand shall have the right for any proper purpose to examine in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom, at the places where the same are kept pursuant to subsection 14A:5-28(1). If the records are kept on an electronic network, the corporation shall convert any records so kept into a clearly legible form upon the request of any person entitled to the records in the timeframe required pursuant to this subsection.

(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 of the proceedings of its shareholders, board, and executive committee,¹²² 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

¹²² *Cain*, 415 N.J. Super. at 331 (holding that the use of the term “minutes” in subsection (4) “refer[s] to the shareholder, board, and executive committee minutes referred to in subsection (1)”).

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.

(5) Holders of voting trust certificates representing shares of the corporation shall be regarded as shareholders for the purpose of this section.

(6) A corporation may impose reasonable limitations or conditions on the use or distribution of requested materials provided to a demanding shareholder: (a) pursuant to either subsection 14A:5-28(2) or 14A:5-28(3); or (b) prior to the order of a court pursuant to subsection 14A:5-28(4).

As used in this section, “electronic network” means one or more electronic networks or databases, including one or more distributed electronic networks or databases that utilize blockchain technology, administered by or on the behalf of the corporation.

As used in this section, “books and records of account” means documents and records prepared in the usual course of operating the business that present the financial position and transactions of the corporation. [These may include: financial statements¹²³ and related reports or audits;¹²⁴ accounting records;¹²⁵ journals or ledgers¹²⁶ showing inventory,¹²⁷ assets, liabilities, receipts, disbursements, gains, and losses;¹²⁸ payroll and executive compensation information;¹²⁹

¹²³ 2016 MBCA, *supra* note 41, at *361 (Section 16.01(b)); see *No-Burn, Inc.*, 2011-Ohio-5635, ¶ 35 (“financial statements and supporting memoranda from accountants”); *Pederson*, 331 P.3d at 387 (“monthly financial statements”); *Coppertech, Inc.*, 19 Pa. D. & C.3d at 351 (“financial reports”).

¹²⁴ 2016 MBCA, *supra* note 41, at 359 (“all annual financial statements . . . and any audit or other reports with respect to such financial statements”) (emphasis added); see also *No-Burn, Inc.*, 2011-Ohio-5635, ¶ 35 (“financial statements and supporting memoranda from accountants”) (emphasis added).

¹²⁵ 2016 MBCA, *supra* note 41, at *361 (“[a] corporation shall maintain accounting records in a form that permits preparation of its financial statements”); *City of Roseville Employees' Ret. Sys.*, 2012 WL 12906489, at *4 (addressing whether the phrase “of account” does not “limit[] the stockholder's right to accounting reports”).

¹²⁶ *Garcin*, 60 A. at 1098 (“the ledger, the cashbook, the checkbook, the bills-payable book, the invoice book, and the salesbook”); *Pederson*, 331 P.3d at 387 (“accounting ledgers”); *Coppertech, Inc.*, 19 Pa. D. & C.3d at 351 (“accounts receivable and payable ledgers”); *Beryl*, 228 N.Y.S.2d at 396 (“general ledger”). See also *IRS Publication 583*, *supra* note 117, at 13 (“Business transactions are ordinarily summarized in books called journals and ledgers.”).

¹²⁷ *IRS Publication 583*, *supra* note 117, at 12.

¹²⁸ *Kemp*, 128 N.J.L. at 322 (“other data of the respondent corporation as to the assets, liabilities, contracts, operations and practices and the administration of the affairs of the corporation”); 1960 MBCA, *supra* note 14, at 114 (permitted a shareholder to request a corporation’s “most recent financial statements showing in reasonable detail its assets and liabilities and the results of its operations”). See also HAW. REV. STAT. ANN. § 414-470(a) (“The books and records of account shall include accounts of the corporation's assets, liabilities, receipts, disbursements, gains, and losses.”) and MO. REV. STAT. § 351.215(1) (“[e]ach corporation shall keep correct and complete books and records of account, including the amount of its assets and liabilities”).

¹²⁹ *Pederson*, 331 P.3d at 387 (“records of individual executive compensation and transfers of corporate assets or interests to executives”); *Beryl*, 228 N.Y.S.2d at 397 (“payroll ledgers”); *No-Burn, Inc.*, 2011-Ohio-5635, ¶ 35 (“[g]eneral and payroll ledgers”).

transfer books;¹³⁰ contracts;¹³¹ and other data relevant to the operations, practices and administration of the affairs of the corporation¹³²].

COMMENT

Proposed language is added to subsection (4) which clarifies that the “minutes” mentioned in that subsection refer to the “minutes of the proceedings of its shareholders, board and executive committee” identified in subsection (1). This proposed modification reflects the holding in *Cain*.¹³³

Additional proposed language intended to clarify the scope of the term “books and records of account” is added as an additional paragraph at the end of N.J.S. 14A:5-28, as the statute also includes a definition for “electronic network” in this manner. Because the *Feuer* Court held that the phrase “books and records of account” has the same meaning in subsections (1) and (4), the same introductory language – “[a]s used in this section” – is proposed.¹³⁴

The first half of the proposed modification provides a more general definition of the phrase “books and records of account.” The language “prepared in the usual course of operating the business” is derived from the description of the phrase “books and records of account” in the *Feuer* opinion,¹³⁵ in which the Court cited with approval the definition of “books of account” in Black’s Law Dictionary.¹³⁶ The Official Comment to the 2016 MBCA also provides that the “financial statements” described in “section 16.01(b) are those that the corporation prepares in the operation of its business, including in response to third party requirements.”¹³⁷

¹³⁰ *Feist*, 30 N.J. Super. at 156 (quoting N.J.S. 14:5-1, the shareholder inspection statute that preceded N.J.S. 14A:5-28, 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.”).

The term “stock book” is synonymous with the “record of shareholders of a corporation” in the current statute. N.J. STAT. ANN. § 14A:5-28(1) (requiring corporations to maintain “a record or records containing the names and addresses of all shareholders, the number, class and series of shares held by each and the dates when they respectively became the owners of record thereof”).

¹³¹ *Kemp*, 128 N.J.L. at 322 (Sup. Ct. 1942) (“contracts”); *Ginsburg*, 8 Pa. D. & C.3d at 757 (“contracts of defendant relating to sale or purchase of assets, raw materials and sale production of goods and materials”); *Weigel*, 57 Ill. App. 3d at 1021 (“contracts with advertisers”); *Ashley Bancstock Co.*, 2017 Ark. App. at 11 (“[i]nsurance policies are contracts [and] contracts are business records pertinent to the operations of a corporation”); *No-Burn, Inc.*, 2011-Ohio-5635, ¶ 35 (“[c]ontracts (employment, consulting, transactional, leases, guarantees, loans) and offers to contract (loan applications”). *But see Susquehanna Corp.* 250 F. Supp. at 800–01 (excluding “records of another corporation whose acquisition is contemplated” and “the proposed contract”).

¹³² *Kemp*, 128 N.J.L. at 322 (allowing inspection of “other data of the respondent corporation as to the assets, liabilities, contracts, operations and practices and the administration of the affairs of the corporation”).

¹³³ *Cain*, 415 N.J. Super. at 331.

¹³⁴ *Feuer*, 455 N.J. Super. at 79 (“We must presume the phrase means the same in both subsections [(1) and (4)] absent a clear indication to the contrary.”).

¹³⁵ *Feuer*, 455 N.J. Super. at 89 (finding the plaintiff’s “inspection demand is one significant step removed from a shareholder’s demand for documents prepared in the usual course pertaining to the corporation’s management or suspected mismanagement”)

¹³⁶ *Id.* (noting that “accounting or financial documents” are “consistent with the . . . common meaning” of “books and records of account” and referencing the definition contained in Black’s Law Dictionary “equating ‘books of account’ with ‘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’”) (quoting *Black’s Law Dictionary* 207, 1504 (9th ed. 2009)).

¹³⁷ 2016 MBCA, *supra* note 41, at *363.

The language directing that “books and records of account” should “present the financial condition and transactions of the corporation” is based on the principle reiterated in several New Jersey decisions that shareholder inspection rights are intended to allow a shareholder to ascertain the corporation’s “financial condition”¹³⁸ and determine “whether there has been proper management of the corporate affairs and business.”¹³⁹ The proposed language closely tracks the language employed in the Official Comment to Section 16.01 of the 1984 MBCA to define the phrase “appropriate accounting records.”¹⁴⁰ The Accountancy Act used similar language to define “financial statements”¹⁴¹ and IRS Publication 583 provided that a corporation should maintain records “that clearly show[the business’s] income and expenses.”¹⁴²

The latter half of the proposed modifications is bracketed to indicate that guidance is requested regarding whether to include this detailed list of documents and records falling within the scope of the phrase “books and records of account.” The proposed language indicates that the list “may include” the following documents and records as there is no definitive list of the specific documents and records that must be maintained by a corporation or that are subject to shareholder inspection within or outside of New Jersey.

The documents and records listed are those that are (1) commonly identified by New Jersey and other jurisdictions as falling within the scope of the statutory shareholder inspection right;¹⁴³ (2) identified in prior New Jersey shareholder inspection statutes;¹⁴⁴ (3) contained in the 2016 and 1960 MBCA;¹⁴⁵ and (4) identified by the IRS guidelines as records to be maintained by a corporation for tax purposes.¹⁴⁶ In addition, the final category is taken from language employed by the New Jersey Supreme Court in *Kemp* to provide an additional “catch-all” provision that ensures that the proposed list is not read as exclusive.¹⁴⁷

¹³⁸ *Szeman*, 127 A. at 326 (permitting inspection “so that [the corporation’s] financial situation may be ascertained”).

¹³⁹ *Kemp*, 128 N.J.L. at 323 (“inspection is justified if only for the purpose of ascertaining whether there has been proper management of the corporate affairs and business”). See e.g. *Wyckoff*, 134 N.J.L. at 173-74 (“[i]t has been repeatedly held that 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, and also to ascertain the value of his shareholdings for the purpose of sale”); *Feick*, 91 N.J.L. at 490 (“upon an examination of the books, that the annual reports made by the company were inaccurate and did not truly represent the business affairs and condition of the company, and hence the present value of the stock would be more or less affected”); *Huyler*, 40 N.J. Eq. at 398 (shareholders were “entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers [because] such a right is necessary to their protection”).

¹⁴⁰ 1984 MBCA, *supra* note 34, at 1712 (describing “appropriate accounting records” as “records that permit financial statements to be prepared which fairly present the financial position and transactions of the corporation”).

¹⁴¹ N.J. STAT. ANN. § 45:2B-44 (defining “financial statements” as “statements and related footnotes that purport to present an actual or prospective financial position at a particular time, or results of operations, cash flow, or changes in financial position for a period time . . .”).

¹⁴² IRS Publication 583, *supra* note 117, at 11.

¹⁴³ See *supra* at notes 123, 125, 126, 128, 129 & 131.

¹⁴⁴ See *supra* at note 130.

¹⁴⁵ See *supra* at notes 123, 124, 125 & 128.

¹⁴⁶ See *supra* at notes 126 & 127.

¹⁴⁷ *Kemp*, 128 N.J.L. at 322.