

CLIENT ALERT

FAA's Pilot Records Database Final Rule Published

June 3, 2021

On May 25, 2021 the Federal Aviation Administration ("FAA") issued the final rule for the establishment of a new Pilot Records Database ("PRD Regulations"). The long-awaited PRD Regulations codify the requirements of §203 of the Airline Safety and Federal Aviation Administration Extension Act of 2010.

The PRD Regulations replace the existing Pilot Records Improvement Act ("PRIA") with the goal of creating a comprehensive, standardized system to be used in pilot hiring decisions. In that regard, the PRD Regulations: (a) require the creation of a central database for the collection of all records relevant to a pilot's performance and qualifications in a standardized format; (b) expand the types of records to be reported to include training and currency records, as well as other records that may reflect negatively on a pilot's flying ability; and (c) expand the requirement to Part 91 operators with of two or more aircraft requiring a type rating or turbine helicopters ("Covered Part 91 Operator").

Changes To Proposed Regulations

The final PRD Regulations have a number of improvements from the original Notice of Proposed Rulemaking published in March 2020 ("Proposed PRD Regulations"). In response to comments received from aviation industry stakeholders, the FAA:

- *Removed the defined term "Corporate Flight Department"* - Multiple commenters noted that the creation of a new defined term for "Corporate Flight Department" may unintentionally create a class of operator that could carry over to other areas of the Federal Aviation Regulations ("FARs"). While the FAA deleted the specific defined term "Corporate Flight Department" in the PRD Regulations, they retained the concept that Covered Part 91 Operators would be subject to the PRD Regulations. The PRD Regulations now merely cross-reference the section of the PRD Regulations that describe the Covered Part 91 Operators instead of using a defined term for that purpose.
- *Limited reporting requirements for Covered Part 91 Operators* - The Proposed PRD Regulations would have required all covered entities to report all records (including currency, adverse training events, termination of employment, and disciplinary records) within 30 days of the event creating the record. Acknowledging the burden this would place on Covered Part 91 Operators, the PRD Regulations instead require Covered Part 91 Operators to maintain reportable records for 5 years and provide them within 14 days if requested. However, this does not apply to records relating to: (a) separation of employment due to pilot performance or professional disqualification; or (b) disciplinary action resulting in suspension from piloting for any amount of time. A Covered Part 91 Operator is required to report these records within 30 days of the event.
- *Removed the Administrative Fee* - The Proposed PRD Regulations provided for payment of an administrative fee that would be based on the overall cost to maintain the database divided by the number of requests, updated annually. The PRD Regulations removed the proposed administrative fee concept but the FAA noted in the preamble that it reserves the right to add an administrative fee in the future.

- *Extended the Timeframe to Report Historical Records* - Under the Proposed PRD Regulations, Part 121 and Part 135 operators would have been required to report all historical records going back to August 1, 2005 within two years after publication of the final rule. Under the PRD Regulations only records going back to January 1, 2015 need to be reported within two years and the remaining historical records going back to August 1, 2005 have to be reported within three years and 90 days.

Remaining Open Issues

The PRD Regulations did not address all issues that industry stakeholders raised in their comments responding to the Proposed PRD Regulations. They also leave unresolved some fairly significant issues and concerns for Covered Part 91 Operators.

The first issue is the expansive scope of records that Covered Part 91 Operators are required to report. For Covered Part 91 Operators, this includes all records related to pilot training, currency, qualifications, and professional competence. Many flight departments and other business aviation operators pride themselves on maintaining the highest level of safety, which generally includes training, evaluation, and standards higher than FAA required minimums. The requirement in the PRD Regulations for Covered Part 91 Operators to retain records for 5 years and report them within 14 days upon request could create a significant new administrative burden for Covered Part 91 Operators. This, in turn, could provide them an incentive to limit the amount of training performed and the records related to pilot training, currency, qualifications, and professional competence that they collect.

The records that operators are required to report also includes comments of a check pilot or examiner. Knowing that any comments could become a part of the pilot's permanent record may discourage honest evaluation and constructive criticism. It wouldn't be surprising to see future evaluations returned as pass/fail without the detailed explanation of deficiencies and suggestions for improvement, ultimately limiting the effectiveness of these tools as part of an operator's safety program.

Another issue is the expansion of the scope of FAA records that will be retained in the database. Under PRIA, the FAA records in the database only included certificates, ratings, medical certificates, and summaries of any FAA legal enforcement action. Under the PRD Regulations this is expanded to include records of any failed checkrides at any level of training. Failure of a checkride for early certificates (i.e. private, instrument, commercial, multi-engine) could be due to factors outside of the trainee pilot's control, such as poor weather, test anxiety, or an overaggressive examiner. Knowing that any failure will become a part of their permanent record and will be reported to any future employer could create additional test anxiety, discourage future potential commercial pilots who fail a checkride for an early certificate, and ultimately exacerbate the existing pilot shortage.

A final issue relates to potential legal risks for employers when determining the scope of information to report. Under the PRD Regulations, employers must report "any final disciplinary action record pertaining to pilot performance," which is defined as "an activity or event directly related to a pilot's responsibilities or completion of the core duties in conducting safe aircraft operations." In the preamble to the PRD Regulations the FAA explains that this was intentionally left open to interpretation by the employer, and provides an example of harassment of another pilot outside of flight operations.

This ambiguous requirement leaves employers in a precarious position. Employers are left to determine what should be reported for items that fit within the definition only tangentially, such as the FAA's harassment example. While it clearly could inhibit crew resource management and overall safety during flight operations if one pilot is harassing another pilot, harassment

itself is not a concept with a clear legal definition. Also, the effect of any such harassment on a pilot's duties may not be as clear cut as an FAR violation, judgement error in flight, or failed training event.

An employer's failure to report a specific event could create an unintended liability for not reporting the event as required by the PRD Regulations, whereas reporting the event could expose the employer to the risk of legal action taken against it by the terminated pilot. Employers often require pilots to sign liability waivers in connection with PRIA, but state employment laws vary and a number of lawsuits on this issue have been filed against employers under PRIA. Employers should be particularly concerned because PRIA required that a much more limited set of records be provided and the records required to be provided were more clearly defined.

The PRD Regulations are a substantial step forward and should be more effective than PRIA at keeping problem pilots out of the cockpit. The process created by the PRD Regulations is also more streamlined than the prior PRIA process for Part 121 and Part 135 carriers that use the program. However, the PRD Regulations create new and expanded record retention and reporting requirements for Covered Part 91 Operators that did not exist previously. As a result, it will be critical for industry stakeholders to conduct outreach on these new requirements and for Covered Part 91 Operators to implement systems to ensure that they retain and report the proper records in compliance with the requirements of the PRD Regulations.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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