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THE PILOT RECORDS IMPROVEMENT ACT OF 1996: UNINTENDED CONSEQUENCES*

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* This Article is written in the authors' personal capacities, and the views herein should not necessarily be attributed to ABC Television Network, ABC News, or the Harris County District Attorney's Office.

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I. INTRODUCTION

ALONE, UNCERTAIN, and unsophisticated in the nuances of law, a young regional airline captain sits nervously across the desk from his chief pilot, absorbing a tirade of displeasure over his logging of an aircraft maintenance problem the company had decided weeks before to ignore.

“We don’t need safety zealots around here!” the chief pilot rails, angered further by the young pilot’s refusal to accept the company’s opinion and drop the matter. “I told you last month when you first wrote it up that maintenance says there’s no problem. Yet you’ve written it up two more times and caused two delays!”

“Look, I’m not a safety zealot,” the captain insists. “I’m just trying to do what’s right. If the FAA finds out about this, we’re in deep trouble, because we’re endangering our passengers by letting that aircraft keep flying.”

While hopefully an infrequent occurrence, exchanges of this sort are an established reality in the world of airline flying. In fact, occasional clashes between airline managers and airline pilots over what is and is not a safety problem are inevitable, given the subjectivity of deciding how much safety is enough against the background of economic competition.

However, despite historic regulatory efforts to equalize the coercive power of both parties in such disputes, the greater power to force one interpretation over another obviously continues to reside in the employer, especially insofar as he controls the method, means, and expertise of ruling on a maintenance deficiency. The corresponding potential for balance—the pilot’s opinion—is highly discountable because the complaining pilot is seldom in a position to counter the technical expertise of a maintenance department or a flight administration department on matters not governed by minimum equipment lists or other specific rule or regulation.¹

The potential for an off-balance clash failing to serve the conservative interests of aviation safety becomes especially acute in smaller airlines, including regional carriers and those histori-

¹ See 14 C.F.R. § 91.3(a)-(b) (2000) (“The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft. In an emergency requiring immediate action, the pilot in command may deviate from any rule [in the Federal Aviation Regulations] . . . .”); 14 C.F.R. § 91.213(a)(4) (2000) (aircraft records must include entries for inoperable equipment).
cally known as commuters. This is particularly true where no pilot association or union exists to back up a worried airman who takes a position regarding safety of flight contrary to that of management. Whether such a dispute is over an impending operation (a pilot seeking permission to ground an aircraft mistakenly loaded beyond maximum gross weight, or a pilot wanting to cancel a flight in the face of questionable weather), or a less time-critical matter (pilot concern over the safety of some policy or procedure), it typically pits a young pilot with limited experience and limited resources in the first years of his or her aviation career against far more experienced managers who also happen to hold the trump card of the pilot's job in their hands.²

Historically, a pilot in such a righteous clash could always make the decision to resign or accept termination rather than comply with what he or she considers a dangerous directive ("shut up and fly that airplane"). Prior to the mid-1990s, such a newly jobless pilot could easily reapply to another air carrier of similar size with the ability to control the means and extent of explanation of the previous job separation or loss.³ And the employer always retained the right to retrain, demote, or dismiss the employee, such power tempered in theory by an aggrieved pilot's right to sue for wrongful termination.⁴

² Typically, non-union smaller carriers retain a level of freedom in hiring and firing pilots not available to larger carriers whose pilots are subject to the procedural protections and limitations of union contracts and the Railway Labor Act. See 45 U.S.C. § 151 (1996). In addition, since smaller carriers traditionally employ less experienced pilots essentially beginning their career, the rate of turnover—pilots leaving and being hired—is usually substantial. Before the passage of Pilot Records Improvement Act (PRIA), this lent an air of casualness to the process of obtaining commuter jobs, resigning from them without consequence, and even accepting an occasional firing without major concern. Now, however, enactment of PRIA has drastically changed the pilot's career penalty for being terminated, without reducing the commuter/regional industry management mindset that firing pilots is relatively routine and low risk disciplinary option.

³ Although, obviously, the propensity for such a pilot purposefully to hide or obscure the basic fact of his or her departure from the previous job was one of many factors leading to enactment of the PRIA. See Clarifications to Pilot Records Improvement Act of 1996, H.R. Rep. No. 105–372, at 2 (1997) [hereinafter Clarifications].

⁴ Having such rights under common law and having the practical means to utilize such rights are two entirely different considerations. Many young commuter pilots make so little in salary that they technically qualify for food stamps, and many are actively repaying loans ranging from $15,000–$70,000 taken out to gain the aeronautical training necessary to qualify for any air-carrier position. When such a pilot has a valid cause of action for wrongful termination, there are two major problems: (a) financing the lawsuit, and (b) limited damages based on salary projections for a commuter/regional pilot. Even if there is a good chance
But what happens to this already off-balance equation when the coercive power of the employer is dramatically increased, and the pilot's rights of recovery—and even the rights of review and correction of the record—are severely truncated? Clearly, as the balance point shifts more in the direction of the employer airline, the role of the pilot as an ultimate guardian of public safety and the last line of defense against an unsafe flight becomes correspondingly more tenuous and ineffective.

Consider, for instance, the lack of public policy desirability of legislatively changing the equation so as to increase the severity of the penalty for being dismissed by any air carrier, however small or poorly managed. Such a change hands the chief pilot in the above scenario the ability to say the following to any of his pilots who may be professionally dissatisfied with the company's safety reaction:

"Okay, here's how it works. If we fire you, that dismissal goes on your permanent pilot record here. Even if you resign, it's our policy to consider you fired for cause and use the same inscription.\(^5\) Now, thanks to the new Pilot Records Improvement Act of 1996, we're required by law to report that information for five years to any other aviation operation that asks us for it, and you're required by law to reveal to any airline you apply to that you worked for us so that they can send us the reporting form. So, there's no place to hide. Delta, American, United, Alaska, or some other regional, are all going to know that you were fired, and you'll have no chance of ever getting interviewed, let alone hired. I mean, who'd want you? If something ever happened with you aboard, regardless of fault, the press and the...
National Transportation Safety Board (NTSB) would crucify them for employing a pilot who’d been, quote, ‘terminated for unsatisfactory performance.’”

The chief pilot leans back, watching the look of utter defeat on the captain’s face.

“So, you go right ahead, captain, and be a zealot if you want. I’ll fire you on the spot, and that, friend, is the end of your career. And you want to know the best part? The law says we can’t be sued for just reporting what’s on your record. So, repeat after me: There... is... no... maintenance... problem... with... ship 121.”

The Pilot Records Improvement Act of 1996 (PRIA) was passed to promote safety among the ranks of America’s airlines by minimizing the potential that a dangerously flawed pilot whose lack of competency had already been discovered at one airline could be considered for subsequent employment by another airline that is unaware of his or her past professional history as recorded in those previous records. Unfortunately, just as new pharmaceuticals approved by the Food and Drug Administration often generate unexpected (and often serious) side effects once released into the general market, the same is often true of legislation, regardless of the purity of the drafters’ intent. It is specifically true of PRIA. While attempts were made to safeguard the interests of the occasional airman falsely accused of incompetence on the record, the mere threat of receiving such a poison pill notation has had three deleterious, and potentially disastrous, side effects:

1) Providing a dramatic increase in the active coercive power of the carrier by guaranteeing that any adverse notation a carrier chooses to place on a pilot’s record will cause catastrophic professional damage if he or she quits or is fired.

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7 Emphasis is to highlight the fact that the truth and accuracy of the pilot records generated by any air carrier are uniquely unreliable due to: (a) the highly subjective nature of the comments entered; (b) the utter lack of standardization requirements under the FAR’s; and (c) the fact that in cases of termination, airline managers have a unilateral opportunity to form such records and associated comments on airman proficiency so as to support their termination of the pilot. There is no effective method or procedure within which a pilot may reliably challenge such records or comments. See Michael E. Abrams, The Controversy Over Requiring Airlines and Other Employers to Share Pilot Records (1996) (unpublished manuscript, on file with the Journal of Air Law & Commerce).
2) Providing a serious and undesirable disincentive for pilots to uphold their responsibilities of independent professional discretion in air safety matters affecting them (passive coercive power); and
3) Creating an essentially unjust system wherein the very means by which the unilateral pronouncements and determinations of an air carrier can permanently destroy a pilot's career are rendered unchallengeable, uncorrectable, and effectively unappealable.

II. PILOT RECORDS IMPROVEMENT ACT

A. REASONS FOR CREATION

In seven fatal accidents involving scheduled airlines between 1987 and 1994, the NTSB found sufficient evidence to include "pilot error" as part of the causal chain, and, grounds for concern about the pilot's backgrounds. Typically expressed in the various accident reports as the "probable" cause or contributing cause, the NTSB in each of these accidents tied causation to performance failures by one or more of the pilots, and in several cases, even raised questions about a pilot's basic professional suitability to be hired by the involved air carrier to begin with. A significant element of commonality among these accidents was the failure of the employing airlines to secure complete em-

8 The phrase "pilot error" is seldom used directly by the NTSB in accident reports or factual findings. Instead, the Board utilizes phrases such as "The probable cause of this accident was the captain's failure to . . ." or "Contributing to this failure was the copilot's failure to. . ." While "pilot error" was the term of art prior to the 1980s for almost any performance failure of a human pilot, major advances in the understanding of human factors and human performance as a sub-discipline of air-accident investigation has led the NTSB to be vastly more careful and precise about labeling what is typically an unintentional human error (deriving from the imperfection of human beings and the normal human propensities for being imperfect) from an intentional or professional discretionary failure (such as intentionally landing with the wrong aerodynamic configuration). See John J. Nance, Blind Trust (W.M. Morrow, 1986).

9 See Clarifications, supra note 3, at 2. These accidents included (1) November 15, 1987, Continental Airlines crash at Denver, Colorado, where twenty passengers died; (2) January 19, 1988, Trans-Colorado Airlines crash at Durango, Colorado, where seven passengers died; (3) February 19, 1988, AVAir crash near Raleigh-Durham, North Carolina, where ten passengers died; (4) October 28, 1989, Aloha Island Air crash in Hawaii, where eighteen passengers died; (5) April 22, 1992, Scenic Air crash in Hawaii, where eight passengers died; (6) December 1993 Express II crash near Hibbing, Minnesota, where sixteen passengers died; and (7) December 13, 1994, American Eagle crash near Raleigh-Durham, where thirteen passengers died. Id.
ploym ent histories of the pilots whose basic suitability had been called into question.10 After four of the seven crashes, the NTSB issued a specific recommendation that airlines be required to obtain records of a pilot's previous performance before hiring the pilot.11 The first recommendation came in 1988 after the crash of a Douglas DC-9 in Denver, Colorado.12 The NTSB learned from its investigation that the first officer's previous employer had fired him because of what the employer termed "unsatisfactory performance," a fact of which the accident airline was unaware.13 In the cases of a 1990 commuter airline accident and a 1993 Hawaiian air tour operator crash, the NTSB concluded that in both instances the employing air carrier's background checks were wholly insufficient to meet the burden of protecting the public from incompetent pilots.14 But it was the 1994 crash of American Eagle Flight 3379, four miles short of the runway at Raleigh-Durham International Airport following an instrument approach in marginal weather conditions, that suddenly grabbed the undivided attention of the federal government, as well as the media and the public.15 The NTSB investigation revealed that before American Eagle hired the captain, he had been forced to quit by his previous airline employer due to what that employer alleged were poor piloting skills.16 The Federal Aviation Administration (FAA), however, refused to take any action based on the NTSB's recommendations for a better scheme of pilot pre-hire background research.17

In 1995 the Subcommittee on Aviation of the House Committee of Transportation and Infrastructure held hearings regarding the issue of sharing pilot records among air carriers.18

10 Id.
11 Id.
12 John S. Yodice, Pilot Counsel: Pilot Record Sharing, AOPA PILOT, Feb. 1997 (the hiring operator did do a background check, however, he did not pick up the unsatisfactory termination).
13 Id.
14 Id.
15 Id.
16 Id. It should be noted that the final NTSB report indicated that the pilot responded exactly as he had been trained to react to the engine problem that was a substantial factor in the accident. The aircraft manufacturer, and the charges of incompetence on the captain's part left severely in doubt subsequently changed the training procedures.
17 See CLARIFICATIONS, supra note 3, at 2.
Overall, the testimony favored rapid legislative action to take the place of FAA inaction. In fact, the NTSB representative stated that “[c]ommercial aircraft accidents are so rare to have four in seven years attributable, even in part, to a single cause should be, for everyone, conclusive evidence of a serious problem.”

The Committee approved the Airline Pilot Hiring and Safety Act (H.R. 3536), which was passed in the House of Representatives on July 22, 1996, by a vote of 401 to 0. The House bill was combined with “The Pilot Records Improvement Act,” a similar Senate bill. This new Act was then incorporated in the Federal Aviation Reauthorization Act of 1996 as Title V.

B. THE ACT AND HOW IT WORKS IN THEORY

PRIA requires an air carrier, before allowing a new hire to begin service as a pilot, to request and receive a large volume of records. The hiring air carrier is required to request from the FAA the pilot’s license, medical certificate, type rating(s), and any enforcement actions that resulted in a finding against the pilot that has not been overturned. PRIA further requires

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19 Id.
20 Id.
21 See Clarifications supra note 3, at 2.
22 Id.
24 Air carriers include FAA Part 121 Scheduled Commercial Operators (Major/National Regional Airlines); FAA Part 125 Commercial Cargo Operators; and FAA Part 135 Non-Scheduled Commercial Operators (Regional Airlines, Charter Operators). PRIA does not define the term “air carrier.” However, 49 U.S.C. § 40102(a) (2) defines air carrier as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.” Under 49 U.S.C. § 40102(a) (25), interstate air transportation is defined as “the transportation of passengers or property by aircraft as a common carrier for compensation . . . between a place in a State, territory, or possession of the United States.” The term “common carriage” has a specific meaning in court decisions defined by “holding out” to the general public or to a segment of the public as being willing to furnish air transportation for compensation. See Memorandum from Joseph Conte on the Scope of the Pilots Records Improvement Act of 1996 to the U.S. Department of Transportation Federal Aviation Administration (July 23, 1997) (on file with author).
25 A 1997 amendment to PRIA changed “hiring an individual as a pilot” to “allowing an individual to begin service as a pilot.” H.R. 2626, 105th Cong. (1997). This change allowed airlines to hire and begin training pilots before receiving the pilot’s records from previous employers. See Clarifications, supra note 3, at 4. This is same as the original version passed by the house (H.R. 3536).
an air carrier to request records from a pilot's previous employer,\textsuperscript{27} which would include proficiency and route checks, aircraft and route qualifications, training, physical exams, physical or professional qualifications, drug tests, and alcohol tests.\textsuperscript{28} PRIA specifically requires that the prior employer provide any "comments and evaluations made by check airman"\textsuperscript{29} and "any disciplinary action taken" by the air carrier that was not subsequently overturned.\textsuperscript{30} Lastly, the prior employer must provide

\begin{itemize}
\item \textsuperscript{27} The 1997 Amendment to PRIA modified the word "individual" by adding after the word "as a pilot of a civil or public aircraft." Under this change, an airline only has to request records from another business that employed that individual as a pilot of a non-military aircraft. \textit{See} CLARIFICATIONS, \textit{supra} note 3, at 4. The law had previously been read to require a records request from all previous employers for the past five years, such as a store where an individual worked as a clerk. \textit{Id.}
\item \textsuperscript{28} 49 U.S.C. § 44936(f)(1)(B). \textit{See also} 14 C.F.R. § 121.683 (These records include proficiency and route checks; airplane and route qualifications; training; any required physical examinations; and actions taken concerning the release from employment or physical or professional disqualifications of any flight crewmember or aircraft dispatcher); 14 C.F.R. pt. 121, app. I § VI(A) (These records include all records relating to the collection process [including all logbooks and certification statements]; records of employee confirmed positive drug test results, Substance Abuse Professional evaluations, and employee rehabilitation; and records of negative test results); 14 C.F.R. pt. 121, app. J, § IV(A) (These records include employee alcohol test results with results indicating an alcohol concentration of 0.02 or greater; records related to other violations of 14 C.F.R. § 65.46(a) [alcohol misuse regulations applicable to employees who perform air traffic control duties] and sections 121.458 and 135.253 [alcohol misuse regulations applicable to employees who perform safety-sensitive functions in aviation, specifically Appendix J to Part 121] documentation of refusals to take required alcohol test, employee evaluations and referrals, records related to the collection process [except calibration of evidential breath testing devices] and training; and records of all test results below 0.02); 14 C.F.R. § 125.410 (These records include those that show whether the crew member is in compliance with regulations governing his or her proficiency checks, airplane qualifications, and any required physical examinations, and records concerning release from employment or physical or professional disqualification of any flight crewmember); and 14 C.F.R. § 135.63(a)(4) (Part 135 requires each certificate holder to maintain an individual record of each pilot used in operations under this part, including full name of the pilot, the pilot certificate [by type and number] and ratings that the pilot holds; the pilot’s aeronautical experience; the effective date and class of the medical certificate that the pilot holds; the date and results of each of the initial and recurrent competency tests and proficiency and route checks required by Part 135 and the type of aircraft flown during the test or check; the pilot’s check pilot authorization, if any; any action taken concerning the pilot’s release from employment for physical or professional disqualification; and the date of the completion of the initial phase and each recurrent phase of training required by Part 135).
\item \textsuperscript{30} \textit{Id.} § 44936(f)(1)(B)(ii)(II).
any "release from employment or resignation, termination, or disqualification with respect to employment." An employer is also required to conduct a national drivers' license search regarding an applicant's prior driving history.

Employers are required under PRIA to maintain records of employee pilots for a period of at least five years. An air carrier is prohibited from providing a response to a request if the record was entered more than five years prior to the request unless the information sought concerns the revocation or suspension of an airman certificate or motor vehicle license that is in effect on the date of the request.

PRIA requires that a written consent of the person who is the subject of the PRIA request must be obtained. If a pilot declines to provide written consent, it appears that the air carrier could not hire him or her. PRIA provides that an air carrier may obtain a release of liability by stating as follows:

[N]ot withstanding any other provision of law or agreement to the contrary, require the individual who is subject of the records request to execute a release from liability for any claim arising from the furnishing of such records . . . by such air carrier (other than a claim arising from furnishing information known to be false and maintained in violation of a criminal statute).

This release of liability has become standard practice in the aviation industry. Section 44936(g)(1) of PRIA provides that no action or proceeding may be brought by an individual who has signed a release from liability "in the nature of an action for defamation, invasion of privacy, negligence, interference with contract, or otherwise under any Federal or State law with

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31 Id. § 44936(f)(1)(B)(ii)(III).
32 Id. § 44936(f)(1)(C).
33 Id. § 44936(f)(4).
34 Id. § 44936(f)(3).
36 Id.
37 Id at § 44936(f)(2).
38 The typical release is worded as follows: "[IMMUNITY AND RELEASE FROM LIABILITY PROVISION]: In accordance with 49 U.S.C. §§ 44936(f)(2) & (g), I agree not to bring any action or proceeding in the nature of an action for defamation, invasion of privacy, negligence, interference with contract, or otherwise under any Federal or State law with respect to the furnishing or use of such records in accordance with the Pilot Records Improvement Act against any carrier, and its agent or employees who requests the records, or any carrier, company, organization or person, and their agent or employee who either enters the information contained in my records or provides the information or records requested in Section II [Applicant's Signature, Date]."
respects to the furnishing or use of records” in accordance with PRIA.\textsuperscript{39}

The records must be provided within 30 days from the date of request.\textsuperscript{40} The pilot who is subject to the request must be informed within 20 days that records have been requested.\textsuperscript{41} The pilot has the right to receive a copy of the records, but he must make an affirmative request.\textsuperscript{42} Both the air carrier and the pilot may be assessed a “reasonable charge” for the processing of requests and furnishing copies. Additionally, the FAA is allowed to provide standard forms to request records, obtain written consent of pilots and inform pilots of record requests.\textsuperscript{43}

An air carrier who receives records pursuant to PRIA must give the pilot applicant the right to review the records.\textsuperscript{44} In addition, the pilot is required to be given a “reasonable opportunity” to submit written “comments” regarding perceived inaccuracies prior to a hiring decision being made by an air carrier.\textsuperscript{45}

PRIA attempts to protect the privacy rights of the pilot by requiring that any records obtained under PRIA can only be used in the hiring process.\textsuperscript{46} The air carrier is required to take “such actions as may be necessary to . . . ensur[e] that information contained in the records is not divulged to any individual that is not directly involved in the hiring decision.”\textsuperscript{47} Subsection (g)(2) of PRIA preempts any State or political subdivision from passing any laws or ordinances affecting PRIA.\textsuperscript{48}

This is a basic primer regarding the statutory framework of PRIA, and how, in a vacuum, it was meant to operate. The complexities of this law, however, have spawned a small cottage industry of firms charging fees to help airlines with the challenges, vagaries, and hazards of PRIA compliance. In fact, the gulf between congressional intent and practical application is proving wider than the most pessimistic expectations of lawmakers as their best intentions become increasingly obscured by dense

\textsuperscript{40} Id. § 44936(f)(5).
\textsuperscript{41} Id. § 44936(f)(6)(A).
\textsuperscript{42} Id. § 44936(f)(6)(B).
\textsuperscript{43} Id. § 44936(f)(8).
\textsuperscript{44} Id. § 44936(f)(10).
\textsuperscript{46} Id. § 44936(f)(11).
\textsuperscript{47} Id.
\textsuperscript{48} Id. § 44936(g)(2).
and unyielding statutory construction and, as demonstrated later in this article, by the unintended, potentially ruinous consequences for honest and competent pilots. Complicating the equation with a degree of urgency is the fact that the unintended consequences of PRIA have created the possibility that the Act itself has spawned a wholly unintended new danger to public safety.

III. WHAT THE ACT DOES RIGHT

PRIA clearly promotes/compels thorough professional background checks of pilots who will be flying for air carriers under Parts 121, 125, or 135. Prior to PRIA, employers had a basic due-diligence incentive to perform background checks, but such checks were not compelled by specific statute or regulation. When such checks were performed, the effectiveness of such efforts was questionable where previous employers, unprotected by specific indemnifications, too often refrained from reporting negative information about a pilot for fear of legal reprisals. Under the current scheme, an employer has a substantially greater chance of screening out professionally substandard pilot applicants with the aid of PRIA-required records, the potential frankness and accuracy of which are greatly enhanced by the statutory indemnification and specific direction afforded the reporting carrier.

In regard to statutory indemnification, the Act provides that a pilot applicant must give a written waiver for an employer to obtain his or her pilot records, and must be notified when the records are obtained. Under the Act, and without regard to practicality or method, the applicant/former employee is given the statutory right to review the records and make comments regarding inaccuracies. The Act does not provide a specifically required framework or procedure with which an applicant can pursue such reviews, however, nor does it provide a formalized method by which the effectiveness of any such added comments by a pilot may be assured. This means that the pilot applicant is subject to the interpretations and good will of both the former airline and the one to which he or she is applying. The Act also puts a five-year time limit on how long the records

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51 Id. § 44936(f)(10)
must be maintained. Further, the Act states that the records can only be used for hiring decisions. These facets of PRIA make sense in the grand scheme of public/operational safety versus the rights of pilots and have the potential to work in a perfect world where human nature and economic pressures need not be considered. Where such factors are considered, however, there are obvious omissions in the Act.

PRIA places a tremendous burden on Part 135 air carriers in particular to obtain the required pilot hiring information, even though that requirement is obviously justified in principle as public policy by the overriding goal of ensuring public safety. Part 135 carriers and small cargo carriers are at the sharp end of the airline economic equation, and their often marginal profitability typically results in greater daily pressure on management and line personnel to hold down costs. In such an environment, the potential for imposing or encouraging cost-controls, which inadvertently diminish safety margins becomes generically greater than in the more stable economic and internal-regulatory atmosphere provided by the larger Part 121 carriers. In a Part 135 atmosphere of cost and performance pressure, the federal air regulations have long contemplated the role of the pilot-in-command as being a last line of defense for passenger safety in that the pilot-in-command has the ultimate authority to decide whether a flight operation is safe or unsafe. Indeed, the pilot-in-command is the pilot “responsible for the operation and safety” of an aircraft during flight time. But there is a concurrent and equally important public policy goal requiring consideration of the “real world” operation of a law affecting public safety in lieu of blindly trusting that the original congressional intent is being realized. It is the dichotomy of this very comparison in the case of the PRIA that raises the potential need for urgent amendment due to the unforeseen and undesirable effects it may be having on the very air safety system it was promulgated to enhance.

52 Id. § 44936(f) (4).
53 Id. § 44936(f) (11).
54 See National Air Transportation Association, supra note 49.
55 14 C.F.R. § 1.1 (2000) (The pilot-in-command is essentially responsible for complete and undiminished compliance with each and every provision of the federal air regulations).
IV. AREAS OF POSSIBLE AIR CARRIER LIABILITY

PRIA does not provide an all-encompassing bar to liability for air carriers. In fact, PRIA leaves significant liability traps, which can too easily snare an unwitting or poorly advised air carrier that relies on the assumption that the waiver of liability sought from each applicant affords absolute protection. Indeed, the Act does provide a broad immunity, but that immunity is not ultimately statutory: it is based on the applicant's executed waiver, a document benefiting solely the employer, and one that air carriers are given the authority to request. In practice, there are no requests: all pilot applicants are required to sign the airline's waiver if they want their application seriously considered. Thus, the resulting "grant" of immunity by applicants is all but universal and possibly subject to later attack from the applicant on the grounds that severe economic diversity between the pilot applicant and the airline invalidates a release obtained by procedural coercion.

Other traps, however, spring from the well of incomplete legislative protection. An air carrier, for example, would not be protected from liability if pilot records obtained under the authority of PRIA were used for purposes not contemplated in the Act, such as a use not reasonably involved in the decisional process of personnel selection. If, for instance, a pilot's PRIA records were maintained in his or her personnel file and those records were later used in any material way to deny a promotion or intensify a disciplinary decision, the air carrier could be recovered against for such misuse. Additionally, the PRIA immunity provisions do not bar suits brought by one air carrier against another, but seek only to protect the employer from its applicant. Thus if a prior employer-carrier fails to disclose to a second employing air carrier relevant information about the dismissal of a pilot, the second air carrier could assert various forms of liability against the first, especially in the event of an accident or incident in which the second carrier has an interest.

57 Apparently no cases have yet arisen utilizing this theory in an attempt to permit a recovery against an air carrier by sweeping away the validity of the applicant release, but the lopsided nature of the release's imposition should raise caution flags.
in shifting or sharing third-party liability. This places a heavy burden on the reporting carrier to be extremely thorough and deliberate in its performance when responding to another carrier’s PRIA request.

There also appears to be no immunity where an air carrier fails to send records and such inaction materially and adversely impacts the applicant’s career. A pilot not hired may have an incentive to seek redress from his or her former air carrier when that former employer has failed to provide a timely response to a PRIA request. Interestingly enough, however, a partial transmittal of prior records would appear to be covered by the immunity provision.

Further, a prior employer risks liability to the applicant if it fails to send records in a timely fashion on the grounds that the fee charged for providing such records has not been received. Response by the former employer air carrier within the thirty-day period is mandatory regardless of form or sufficiency of payment.

Responses by non-employers appear not to be covered by PRIA’s grant of immunity. If, for example, a flight academy responds to a PRIA request regarding a former student, no protection is afforded as against that student. It also appears that the immunity only covers written documents. Oral disclosures regarding a pilot would not be covered. Entries made in a pilot’s records after he or she left employment would not be covered.

Uncertainties exist as well with companies or corporate flight departments operating under Part 91. Such operations are not required under Part 91 to keep the type of pilot records contemplated by PRIA. However, if the operator does elect to keep records, thus serving the public interest by complying with a higher standard, there appears to be a corresponding responsibility imposed by PRIA requiring that operator to divulge any

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60 See National Air Transport Association, supra note 49, at 10.
61 Id.
62 Id.
64 See National Air Transport Association, supra note 49, at 10.
67 Id. at 9.
68 See Conte, supra note 24 (FAA interpretation that Part 91 carriers are covered).
such records in response to a PRIA request. The disclosing company, once in compliance with the disclosure requirement, would appear to be protected to the same degree as a Part 135 or 121 carrier, but a specific statement in the Act of protection in that case would be helpful.

As with most new legislation, the principal difficulty in arriving at precise interpretations of PRIA is the lack of case law settling various potential challenges. While clearly grounded in the broad public policy interest in protecting public safety, not every question of applicability and protection can be correctly answered by defaulting to the most safety-conservative interpretation. This caution is valid because the operation of the PRIA disclosure requirements also materially impacts, and may directly damage or destroy, the careers of pilots who have in most cases invested many years and considerable funds in achieving what may be lost with a single PRIA response. Given the equally important public policy concerns that individuals not have their livelihood wrongly or negligently damaged or destroyed by mistake or illicit design, the need for greater precision in PRIA’s provisions to minimize the gaps that currently exist in protection of both air carriers and applicants seems obvious. That, of necessity, means that the Act must be carefully and rapidly amended to achieve its original purpose of providing appropriate protection to all parties affected, especially since such “appropriate protection” is unlikely to arise from litigation.

V. UNINTENDED CONSEQUENCES OF THE ACT

As indicated above, the goal of PRIA is to provide air carriers with a substantially more accurate method of assessing the aeronautical abilities of pilot applicants by creating a system requiring examination of the records of a pilot’s performance with previous employers. In establishing this new system in the interest of minimizing the chance of an air carrier hiring substandard pilots, Congress inaccurately assumed the presence of a nonexistent uniformity in the accuracy, honesty, and standards used in preparation of air carrier pilot records. Since all assessments made under the resulting PRIA system can be no better than the records that form the basis of that system, the failure to standardize the form and content of such record keeping, the failure to protect airmen against incorrect records adversely im-

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pacting their careers, and the failure to provide stiff penalties to air carriers who knowingly permit frivolous, false, or otherwise incorrect information to be included in such records seriously compromises the integrity of the results. In addition, these failures both unfairly impact certified commercial airmen, and dangerously upset the balance of coercive power between the employing air carrier and an individual pilot who objects in the interests of safety to some procedure or operation favored by the air carrier.

The compromising nature of the present PRIA system can be seen most clearly in situations involving a pilot terminated for what he or she believes was an uncompromising safety decision. Clearly, the objectivity of the resulting notation in the pilot’s record of employment will depend entirely on the largess and fairness of an air carrier that has already taken a firm stance against the pilot’s actions. Logically and generically then, such circumstance has little chance of generating a fair assessment of the airman’s action, and may, in fact, ruin or destroy the career of an otherwise superlative certificate-holding pilot whose sole offense was to uphold the public’s overriding interest in being the last line of defense in airline safety (for example, refusing to fly without de-icing an ice-encrusted commuter aircraft, despite the significant cost, which, in some cases, can be thousands of dollars). Equally disturbing is the inherent injustice of creating a system in which the opinion and attitude of the air carrier, right or wrong, becomes effectively unchallengeable due to the reality of the application of a federal law. Under PRIA, an airman terminated for almost any reason becomes a pariah in the industry without any practical opportunity of correcting the record, even where solid evidence exists that the firing was unjust. Correspondingly, insertion of wrong or unfair negative comments regarding a pilot’s airmanship can become a means of forcing that pilot to remain in the inscribing air carrier’s employ, since the presence of such comments effectively negates the pilot’s ability to quit and go elsewhere. Whether a true perception or not, PRIA’s effect has severely heightened the apprehension among pilots that they have few, if any, choices regarding their own employment. PRIA, in other words, has become in the minds of beginning airline pilots a Sword of Damocles hanging over their heads, a weapon controlled solely by the air carrier.

The multiple problems with PRIA’s effective application merely begin with the utter lack of standardization in the form and content of the pilot records promulgated and exchanged
Under the Act.\textsuperscript{70} Under the current law, there is no way to measure the strength or validity of any comments made by a prior-employing air carrier in a pilot's records.\textsuperscript{71} A comment made by a check airman could be made for political, discriminatory, malicious, or mistaken reasons.\textsuperscript{72} Disciplinary actions may have been taken by an unscrupulous air carrier to intimidate a strong-willed, safety-minded pilot and keep him or her in check.\textsuperscript{73} Training records may reflect negatively on a pilot when in reality the entries were made to cover a lax instructor, substandard training methods, or unacceptable and unfair disruptions in the training curriculum.\textsuperscript{74}

PRIA does provide a formalized opportunity for the pilot to add a comment to any entries that were made in records.\textsuperscript{75} That method, however, provides no practical procedure for correcting wrong or unjust entries, and given the uselessness of trying to explain away a blemish to a future air-carrier employer, thus provides no remedy at all. Specifically, PRIA's provision for including a corrective or dissenting comment is useless because, in today's litigious environment, few (if any) air carriers are brave enough to risk hiring a pilot with a blemished record when so many other pilots are available with unblemished histories.\textsuperscript{76} Even a cogent and corrective explanation in the pilot's record of some operational or training blemish, or of a dismissal, will be almost universally insufficient to convince the airline. In the eyes of the would-be hiring air carrier, hiring such a pilot opens them to additional liability, since a future plaintiff might assert that there was clear negligence in the mere act of hiring a pilot whose records reflected even a rebuttable presumption of substandard performance somewhere in the previous five years. Additionally, an air carrier is neither required, nor generically

\textsuperscript{70} See Abrams, \textit{supra} note 7, at 1.

\textsuperscript{71} \textit{Id.} at 7.

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.} The flight administrative culture at Air Illinois in Carbondale, Illinois, in the mid-1980s provides a disturbing example of an airline that permitted a cockpit culture to develop that effectively supported direct FAR violations and unacceptable risk-taking and intimidated the attempts of any copilots who dared oppose a risk-taking captain. The NTSB final report on the crash of Air Illinois Flight 710 on October 11, 1983, near Pinckneyville, Illinois, reflected a host of cultural problems with the airline and the resulting pressures on nonconforming aircrew members to conform to attitudes, methods, and procedures that ranged from non-conservative to violative.

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} See 49 U.S.C. § 44936(f)(9).

\textsuperscript{76} See Abrams, \textit{supra} note 7, at 8.
inclined, to believe the correctness of an applicant’s record correction comments, or for that matter even to consider them or agree to do any further investigation.\textsuperscript{77}

By passing the PRIA, Congress has unwittingly given unscrupulous and careless air carriers alike the ultimate club with which to beat a pilot who would dare to disagree on any number of issues. The operator can blemish a pilot’s record for five years and essentially destroy his or her career. In the competitive struggle to earn enough experience (flight time) to qualify for a pilot position with a major airline, a single blemish can, and does, effectively terminate the quest. Pilots and operators fully understand this and operators seldom have to directly threaten pilots with the consequences of bucking their authority. The operator can effectively ruin a career with the stroke of a pen, and the operator will be immunized from liability in doing so because the applicant has signed the “required” release under PRIA, an act over which he or she has no real choice. Additionally, a young pilot will seldom if ever be in a financial position to litigate the issue of a false or patently unfair and unsupportable record entry. Even if a pilot were financially secure enough to finance litigation (the costs of which could easily exceed $100,000), the time involved to resolve a lawsuit of this nature, and the absence of a statutory or procedural method of accelerating such litigation, effectively eliminates any real chance that the pilot will ever be hired as an airline pilot again. The time lost in flight operations is particularly detrimental since most large airlines put a premium on current flight experience and tend to reject even the most qualified applicants who have not flown actively for the length of time litigation would take (18-36 months).

Additionally, there are no structured procedures under PRIA for reviewing and, where appropriate, correcting an entry in a PRIA record. This deficiency has the unintended consequence of violently shifting the balance of power away from the safety-oriented pilot to the air carrier, and the air carrier will always be, by nature, profit driven and desirous of minimizing expenses. That dynamic continually tests the limits of what is and is not acceptable in the interest of flight safety. The interests of flight safety therefore demand the independent oversight of an ultimate on-scene safety monitor, a task assigned by the FAR’s to the pilot in command. PRIA’s unintended but radical shift in coercive power, as a matter of logic, puts the flying public at risk.

\textsuperscript{77} See id. at 10.
While it is certainly true that most air carriers not only refrain from the conduct discussed in this article, but struggle to ferret out and prevent such attitudes from becoming established, human nature and economics dictate that the potential clearly exists for PRIA to provide a weapon to those exceptions in the air carrier community who would act against a pilot who refused to accept the company solution to every safety problem. If just one air carrier, however large or small, does in fact use PRIA as a "club" to mute a safety-oriented pilot, that single occurrence is unacceptable as a systemic matter in the United States and virtually mandates a change in PRIA's provisions. A rapid legislative initiative is therefore required to restore the balance of power for the benefit of the flying public, and more specifically, to permit PRIA to accomplish the beneficial and needed reforms for which it was passed.

VI. PROPOSED SOLUTIONS TO THE UNINTENDED CONSEQUENCES

The most destructive deficiency of PRIA is the utter lack of protection it affords pilot applicants from the disastrous effects of any incorrect information contained in records of previous employment. Therefore, the Act should be amended to incorporate a new statutory scheme within which timely challenges and, where appropriate, corrections can be made. The competing interests that must be balanced here are the legitimate needs of pilot applicants to correct detrimentally inaccurate information and expunge false characterizations of pilot performance, versus the need of the potential employer (as the steward of airline safety) to ascertain true and fair characterizations of the applicant pilot's prior performance and quality. If the pilot applicant is given a method of record-challenge and correction that essentially penalizes the former employer for inscribing any negative information (penalties in the form of forcing expenditures of company time and resources to defend or support their record inscriptions regardless of veracity), the balance of coercive power may be shifted disastrously in favor of the pilot. In such case, the pilot could theoretically discourage a current employer from notation of even correct derogatory information by merely having the statutory right to involve the employer in a formal challenge at will and without penalty. Thus, whatever scheme is constructed should carry some inherent penalty enforceable against the pilot for frivolous filings or purposeful misuse of the right of challenge. On the other hand, any new
method of challenging a record’s accuracy will fail if pilots who are unable to afford legal counsel or a lengthy appeals process do not tailor it to be easy to use in practical terms. Since, as previously stated, many pilot applicants in need of a system of challenge will be unemployed, frightened of extracurricular industry retaliation or “blackballing,” legally unsophisticated, legally unrepresented, and possessed of little if any monetary reserves, a formal system that involves attorneys and depositions and all the usual accouterments of legal actions will be useless and inaccessible. Instead, the concept underlying the nationwide creation of “small claims courts” in the form of a specific hearing should be looked to as an example in principle of what is needed here:

1. The method of challenge should not require, or permit, the use of lawyers at its primary level. Any company operating as an air carrier will already have extensive access to good legal counsel, while the pilot applicant may be unable to hire any but the most inexpensive and least experienced lawyers. The intimidating effect of such an imbalance is obvious and immediately prejudicial.

2. The challenge or request for review and revision should begin with the filing of a simple complaint in any coherent written form by the pilot applicant, and such filing should be made by the pilot applicant himself or herself. Argument by the pilot of precisely what is in his or her record is inaccurate, and factual testimony to explain why, should be presented directly by the pilot, the veracity of such testimony to be subject to both penalty of perjury and the penalty of FAA license revocation for making a false material statement.  

3. The statutory scheme must select the most neutral, least formal, and most respected “hearing-examiner” methodology possible. This precludes the FAA serving in such a capacity, as the FAA is inevitably an interested party. (In fact, to include the FAA—let alone to permit the FAA to utilize anything discovered in the process of appeal as grounds for disciplinary or exclusionary action—would destroy the usability of the system and cast a pall of danger over the otherwise simple act of requesting a record revision.) In addition, the NTSB should also not serve as the forum.

78 New enabling language in the FAR’s may be necessary to implement this.
of this review process since the NTSB has a long and uncomfortable history of processing appeals from FAA certificate actions (and doing so with only an occasional ruling against the FAA). Considering the widespread lack of airman trust of the NTSB-FAA appeals process, or the administrative law process, assigning such a new and subjective responsibility to the NTSB would tend to discourage pilots from using it.

One significant possibility would be the creation and certification of a special class of mediator to handle record appeals under a revised PRIA. Under strict guidelines and controls mandating neutrality and proscribing conflict-of-interest entanglements, such mediators, on a freelance basis, could conduct minimally formal hearings. As a result of their findings, such mediators should render rapid decisions under a strict timetable or, at their discretion, require additional information from the air carrier or the pilot applicant. The losing party should pay the compensation of such a mediator. In other words, if an air carrier’s records are changed or amended as a result of the findings of such a hearing, the air carrier must immediately pay the costs of the mediation, regardless of whether the records were wrong due to mistake or purposeful action. Correspondingly, an unsuccessful pilot applicant appellant must pay the costs. The mediator should also have the authority to cite a pilot applicant for a frivolous appeal and impose a substantial monetary penalty, as well as perhaps authorize a report of such finding to be affixed to the pilot’s records held and reported by the former employer. The use of this procedure, in other words, would not be without risk to the pilot applicant if, in fact, there was no reasonable basis for seeking review and change of his or her records.

4. The burden of proof that the air carrier’s record of pilot performance is correct should be on the air carrier, not the pilot. Due to the vast difference in coercive power between the pilot and the employer and the potentially disastrous consequences of inaccurate prejudicial inscriptions, and the superior skills and reporting requirements vested in and expected of the air carrier, the air carrier should at all times be able to bear this burden with ease when the pilot records are accurate. In fact, any derogatory information on a pilot file should trigger such an internal test in each and every case in anticipation that a challenge will require the same level of documentation and validating testimony of the check airmen and administrative personnel involved. If the im-
position of such a review process as contemplated here has the effect of putting all air carriers on notice that they must be vastly more careful, deliberate, and fair in their preparation of pilot records, then a large measure of the corrective intent of these recommended amendments will have been achieved from the start.

5. The mediator or examiner must be statutorily proscribed from using the superior administrative, supervisory, or operational abilities of the air carrier or its personnel as grounds for imputing a presumption of correctness or accuracy to any derogatory information on a pilot's file. Challenges by a pilot to the accuracy of his or her record with a prior employer should be judged by the hearing examiner or mediator on the basis of the entirety of the statements, documents, and evidence presented, as measured against the background of normal daily air-carrier operations and training.

6. While formal discovery and subpoena processes should not be used or permitted, both the pilot and the air carrier should be required to produce all applicable documents voluntarily and without alteration. Subsequent proof that an air carrier failed to do so should give rise to accelerated damages in any formal lawsuit, and that fact alone should terminate any defense the air carrier might otherwise have had that it was released from liability under the provisions of PRIA.

7. The pilot should have the right to require the presence of, and to question and require the explanation and defense of, those air-carrier personnel directly involved in the notation of the objected-to information on his record. Such individuals may not substitute counsel for their personal appearance, since the point of this provision is to provide the pilot the chance to confront his or her accuser, consistent with a basic principle of American jurisprudence. (To this extent, written assertion of professional incapacity or poor performance on a record that could end or damage a pilot's career becomes, pro forma, an accusation, regardless of the accuracy or the authorized methodology under which it is made).

8. If an air carrier loses such a challenge, it should immediately, in accordance with the hearing examiner or mediator's instructions, appropriately alter the pilot's permanent record and provide him or her with three certified copies. Transmittal of the former, subsequently disallowed inscriptions under PRIA should subject the carrier to
treble damages and should remove all protection from liability under the Act.

9. Appeals from decisions under this process should be at the peril of the appellant. *Appeal could be taken by either party directly to the United States Court of Appeals for the Federal Circuit in precisely the same manner as an appeal from a ruling of the Merit Systems Protection Board,* but a failed appeal by a pilot should result in imposition of all attorney and court costs on that appellant.

**Methodology:** *The procedural alterations to the Act should include the following requirements:*

When a pilot leaves employment with an air carrier for any reason, voluntary or otherwise, the carrier must, within 30 days, provide the pilot with a full and complete copy of the records precisely as they would be forwarded under a PRIA request, accompanied by a business records affidavit. A purposeful furnishing of record copies containing material alterations from the record copies that would be forwarded under PRIA should subject the carrier to treble damages in any applicable tort action based on that conduct. The pilot should have six months from the date of receipt of such copies within which to file a protest or demand with the air carrier for correction or expungement of notations on the provided records that he or she believes are in error, such letter to include the address where the air carrier's formal response must be sent. In the event an air carrier fails to provide such records on separation or termination in accordance with this procedure, there should be no limit on when the pilot may make a subsequent demand for record correction or avail him- or herself of the provisions of PRIA. Additionally, failure by an air carrier to provide the records in accordance with the foregoing should place the carrier "at risk" without the statutory liability protection of PRIA if derogatory information is subsequently found to be false or incorrect, without reference to knowledge or intent.

The air carrier should have 20 days from certified receipt of such a protest and notification to either make the requested alterations, or notify the pilot that it refuses to do so. Alternatively, the carrier may request of the pilot, and the pilot at his or her option may agree to, a conference between pilot and carrier for the purpose of reaching a reasonable compromise on reformation of the records in accordance with the pilot's objection. Such a good-faith meeting must nevertheless be held within 30
days of the pilot’s request. If agreement is not reached, the carrier then should have 10 days within which to furnish the pilot with a certified notification that it refuses to alter the pilot’s records as the pilot demanded. Failure of an air carrier to respond in a timely fashion to these required actions removes any bar to suit by the pilot under PRIA for defamation or any other associated theory of liability. Any rejection of a pilot’s demanded changes must be accompanied by a statement of why the air carrier believes the records are both correct and defensible, and must include citation of the names of the personnel who were directly involved in making the initial inscription and the decision not to alter them. It should be the responsibility of the air carrier to send the notification to the airman at the address given on the airman’s protest or demand letter, or, if none is given, by sending it certified mail to the last address on the pilot’s license.79 A subsequent finding by a mediator, or any court of competent jurisdiction, that an air carrier has clearly manipulated the foregoing requirements in bad faith for purposes of thwarting this Act or illicitly frustrating the pilot’s rights under this Act should subject the carrier to treble damages.

Correspondingly, once a pilot has initiated an action under these modified provisions for review and alteration of records alleged to be false or incorrect, any purposeful action in bad faith by an air carrier to fail to comply by withholding records of personnel or otherwise purposely attempting to frustrate the process should subject the carrier to treble damages. This prohibition includes any purposeful act of hiding, obscuring, obstructing, or otherwise failing to voluntarily produce information relevant to the request for change of record. While no statutory scheme involving human institutions can perfectly insure against purposeful frustration or sabotage, the threat of treble damages arising from some subsequent formal court action would substantially improve the possibility that such a “full voluntary disclosure of documents” requirement has a substantial chance of being effective.

It should be noted that the foregoing postulated alterations to PRIA, and the promulgation of a methodology for direct and more simplified application for record change vested in a pilot whose career is on the line, have been weighted heavily in favor of the pilot in order to equalize both the imbalance of economic

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79 See 14 C.F.R. § 61.60 (2000). In order to maintain a valid pilot certificate, the holder must notify the FAA within thirty days of a change of address.
power and the overall imbalance of coercive power in favor of the air carrier in virtually every instance. The basic principle to be followed here if PRIA is to be repaired and made as fair as it is effective for all interests is simply this: A rapid, inexpensive, effective, and utterly fair examination by a scrupulously unbiased mediator is to be considered vastly superior to a system of "appeal" which is essentially unusable by the potential appellant pilot (due to economic realities) or essentially untrustworthy in the eyes of the pilot community (due to built-in bias favoring the acts of the magisterial authority of an air carrier).

PRIA in its present form is dangerously flawed, and immediate amendment to correct the deficiencies identified herein are, quite literally, a matter of safety directly affecting the public interest.