

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Subcommittee on Transportation, Tourism, and Economic Development

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BILL: PCS/CS/SB 842 (326920)

INTRODUCER: Appropriations Subcommittee on Transportation, Tourism, and Economic Development;  
Transportation Committee; and Senator Artiles and others

SUBJECT: South Florida Regional Transportation Authority

DATE: April 14, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Price</u>	<u>Miller</u>	<u>TR</u>	<u>Fav/CS</u>
2.	<u>Pitts</u>	<u>Pitts</u>	<u>ATD</u>	<u>Recommend: Fav/CS</u>
3.	<u>                    </u>	<u>                    </u>	<u>AP</u>	<u>                    </u>

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

PCS/CS/SB 842 authorizes the South Florida Regional Transportation Authority (SFRTA) to enter into contractual indemnification agreements with All Aboard Florida (AAF) and Florida East Coast Railway (FECR) on a rail corridor owned by AAF or FECR and in which all three entities operate rail service. The bill authorizes the Florida Department of Transportation (FDOT or department) to assume the obligations to indemnify and insure under such contractual agreements any freight rail service, intercity passenger service, and commuter rail service on a department-owned rail corridor or on a rail corridor where the FDOT has the right to operate.

The bill also deems funds provided by the FDOT to the SFRTA to be state financial assistance subject to specified requirements. The bill requires the FDOT to provide funds to the SFRTA in accordance with a written agreement containing certain provisions and authorizes the FDOT to advance funds at the start of each fiscal year, with monthly payments from the State Transportation Trust Fund (STTF) to the SFRTA for maintenance and dispatch on the South Florida Rail Corridor (SFRC) over the fiscal year on a reimbursement basis.

An indeterminate negative fiscal impact on state government and the SFRTA is expected. See Section V., "Fiscal Impact Statement," for details.

The bill takes effect July 1, 2017.

## II. Present Situation:

### Freight Rail, Commuter Rail, and Intercity Passenger Rail

In 1988, the FDOT and CSX Transportation, Inc., (CSX) entered into an agreement under which the department bought approximately 81 miles of CSX track and right-of-way in order to operate commuter rail in South Florida. In 2003, the Legislature created the SFRTA, an agency of the state, as the successor to the Tri-County Commuter Rail Authority with all of its rights, privileges, and obligations.<sup>1</sup> The SFRTA is authorized to coordinate, develop, and operate a regional transportation system in the tri-county area of Broward, Miami-Dade, and Palm Beach Counties,<sup>2</sup> providing commuter rail service (Tri-Rail) for residents and visitors in the area served. The FDOT continues ownership of the SFRC, which runs parallel to I-95, extending south to Miami International Airport and north into Palm Beach County.

Florida East Coast Railway (FECR) owns<sup>3</sup> an existing rail corridor between Miami and Cocoa on which it operates freight rail service.<sup>4</sup> All Aboard Florida (AAF)<sup>5</sup>, a subsidiary of the parent holding company of FECR, is currently developing an intercity express train service, called “Brightline,” using the existing FECR corridor between Miami and Cocoa. AAF will build new track along State Road 528 between Cocoa and Orlando. Service between Miami and West Palm Beach is expected to be launched this year, with service from Miami to Orlando following.<sup>6</sup>

The SFRTA is planning to expand Tri-Rail service using the existing FECR corridor. Known as the “Tri-Rail Coastal Link,” the project would reintroduce commuter service for passengers along an 85-mile stretch of the FECR corridor between downtown Miami and Jupiter, connecting 28 densely populated cities in east Miami-Dade, Broward, and Palm Beach Counties.<sup>7</sup> SFRTA’s service on this link would share tracks with FECR’s freight trains and AAF’s Brightline, providing intercity passenger service. The SFRTA will have co-located stations with Brightline in Miami, Ft. Lauderdale, and West Palm Beach. AAF construction projects for the stations are at various stages.<sup>8</sup> AAF is reportedly unwilling to proceed with completion of Tri-Rail’s portion of the Miami Central Station in part due to the absence of a contractual agreement to indemnify and insure FECR and AAF.<sup>9</sup>

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<sup>1</sup> Chapter 2003-159, L.O.F.

<sup>2</sup> Section 343.54, F.S.

<sup>3</sup> Florida East Coast Industries (FEI) is the holding company for FECR. Fortress Investment Group acquired FEI in 2007.

<sup>4</sup> See the FECR website available at: <http://www.fecrwy.com/about>. (Last visited March 17, 2017.)

<sup>5</sup> AAF is a wholly owned subsidiary of FEI. See the AAF website available at: <http://www.allaboardflorida.com/>. (Last visited March 17, 2017.)

<sup>6</sup> See the AAF website available at: <http://www.allaboardflorida.com/>. (Last visited March 17, 2017.)

<sup>7</sup> See the FDOT website available at: <http://tri-railcoastallinkstudy.com/>. (Last visited March 17, 2017.)

<sup>8</sup> *Supra* note 6.

<sup>9</sup> See *Legislative inaction, indemnification ruling impact Miami=Orlando rail service future*, May 28, 2016, available at: <http://flarecord.com/stories/510745198-legislative-inaction-indemnification-ruling-impact-miami-orlando-rail-service-future>. (Last visited March 17, 2017.)

## Liability on Rail Corridors

Commuter rail operators often seek to use existing track or right-of-way, which is primarily owned by freight rail operators, because of the expense of building new rail infrastructure.<sup>10</sup> Consequently, commuter rail operators must enter into agreements with the freight rail operators regarding how they will access the right-of-way. The most common challenge that occurs during negotiations between the commuter rail operator and the freight rail operator is determining liability.<sup>11</sup>

The introduction of commuter trains on rail corridors that were previously used exclusively for freight operations inherently raises the freight operators' risk of liability due to the increased number of persons and trains present within the corridor. Accordingly, most freight rail operators want the commuter rail operator to assume all risks associated with the presence of the commuter rail service. Freight rail operators refer to this as the "but for" argument – "but for the presence of the commuter rail service, the freight railroad would not be exposed to certain risks; therefore, the freight railroads should be held harmless."<sup>12</sup> Recognizing the exposure of liability for both parties, Congress passed the Amtrak Reform and Accountability Act of 1997, which limited the aggregate overall damage liability to all passengers from a single accident to \$200 million.<sup>13</sup>

When Congress created Amtrak in 1970,<sup>14</sup> Amtrak contracted with freight railroads to operate passenger rail service within freight corridors. These agreements were predicated on a no-fault allocation of liability. For example, a typical agreement indemnified the freight operators for "any injury, death or property damage to any Amtrak employees, Amtrak property or Amtrak passengers," and the freight operators would also indemnify and hold harmless Amtrak for "any injury, death or property damage" to freight employees and property.<sup>15</sup> According to one report, despite this language, some courts have held that the provisions do not apply in cases of gross negligence.<sup>16</sup>

## Florida Rail Liability Provisions

In 2007, the FDOT entered into an agreement with CSX Transportation, Inc., (CSX) to purchase 61.5 miles of track or right-of-way in Central Florida to provide commuter rail service, contingent on passage of legislation containing certain indemnification provisions. Known as SunRail, the first phase of the project opened in 2014, connecting DeBary in Volusia County to

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<sup>10</sup> U.S. General Accounting Office, *Commuter Rail: Information and Guidance Could Help Facilitate Commuter and Freight Rail Access Negotiations*, Report GAO-04-240, 5 (Jan. 2004), available at <http://www.gao.gov/assets/250/240916.html>. (Last visited March 17, 2017).

<sup>11</sup> *Id.* at 17.

<sup>12</sup> *Id.* at 18.

<sup>13</sup> *Id.*

<sup>14</sup> Congress passed the Rail Passenger Service Act of 1970, creating Amtrak to take over passenger rail service and relieving freight railroads of the responsibility of providing passenger service. U.S. General Accounting Office, *supra* note 10, at 8.

<sup>15</sup> See the Transportation and Economic Development Appropriations staff analysis of HB 1-B, Engrossed 1, at 4., available at: <http://archive.flsenate.gov/data/session/2009B/Senate/bills/analysis/pdf/2009h0001B.ta.pdf>. (Last visited March 17, 2017.)

<sup>16</sup> Center for Transportation Research, The University of Texas at Austin, *Passenger Rail Sharing Freight Infrastructure: Creating Win-Win Agreements*, Project Summary Report 0-5022-S, 3 (March 2006), available at: [http://ctr.utexas.edu/wp-content/uploads/pubs/0\\_5022\\_S.pdf](http://ctr.utexas.edu/wp-content/uploads/pubs/0_5022_S.pdf). (Last visited March 17, 2017.)

Sand Lake Road in Orange County and featuring 12 Central Florida stations.<sup>17</sup> Today, the FDOT operates the SunRail system, and CSX continues to operate freight trains in the corridor.

In 2009,<sup>18</sup> the Legislature authorized the FDOT in s. 341.302, F.S., to contractually indemnify a freight rail operator and the National Railroad Passenger Corporation (Amtrak) for any loss, injury, or damage to commuter rail passengers or rail corridor invitees, regardless of circumstances or cause, including negligence, misconduct, nonfeasance, or misfeasance. The contractual indemnification, however, is subject to the following parameters and exceptions:<sup>19</sup>

- If only a freight train is involved in an incident, the freight rail operator is solely responsible (pays 100 percent) for any loss, injury, or damage to its property and people, as well as for losses related to incidents involving trespassers and grade crossings. The department pays for loss, injury, or damage to any commuter rail passengers or invitees.
- If only an FDOT train (or “other train,” as explained below) is involved in an incident, FDOT is solely responsible (pays 100 percent) for any loss, injury, or damage to its property and people, as well as for losses related to commuter rail passengers, rail corridor invitees, trespassers, and grade crossings.
  - Any train that is neither FDOT’s train nor the freight rail operator’s train is considered an “other train.” An “other train” is treated as an FDOT train solely for purposes of allocation of liability between DOT and the freight rail operator, as long as FDOT and the freight rail operator share responsibility equally as to third parties injured outside the rail corridor.
- If both a freight train and an FDOT train, or a freight train and an “other train,” are involved in an accident, the freight rail operator is solely responsible (pays 100 percent) for its property and all of its people. The freight rail operator and FDOT share responsibility one-half each (each pays 50 percent) for any third-party damage resulting outside the corridor or for damage relating to trespassers. The department is solely responsible (pays 100 percent) for its property and all of its people, including commuter rail passengers and invitees, except in certain cases involving willful misconduct or resulting in the award of punitive or exemplary damages, as explained below.
  - When there is a collision between an FDOT train and a freight train only and the freight rail operator’s conduct amounts to willful misconduct or results in the award of punitive or exemplary damages, FDOT pays amounts in excess of its insurance deductible or self-insurance fund only if the freight rail operator pays for the amount of the insurance deductible or self-insurance fund (which is capped at \$10 million).
- If an FDOT train, a freight train, and any “other train” are involved in an incident, the allocation of liability remains one-half each between FDOT and the freight rail operator for any loss, injury, or damage to third parties outside the rail corridor. If the “other train” makes any payment to third parties injured outside the corridor, the allocation of credit shall not reduce the freight rail operator’s allocation to less than one-third of the total third-party liability.

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<sup>17</sup> See the SunRail website available at: <http://corporate.sunrail.com/stations-trains/phase-1-stations/> (last visited February 14, 2017).

<sup>18</sup> Chapter 2009-271, L.O.F.

<sup>19</sup> See s. 341.302(17), F.S., relating to the FDOT’s grants of authority with respect to the acquisition, ownership, construction, operation, maintenance, and management of a rail corridor.

Additionally, in a freight-train-only accident, the freight rail operator is solely responsible for all damages relating to incidents with trespassers or at grade crossings. In an FDOT-train-only accident, the department is solely responsible for all damages relating to incidents with trespassers or at grade crossings. In an incident involving an FDOT train (or an “other train”) and a freight train, the department and the freight rail operator share responsibility one-half each as to damages to trespassers and third parties outside the rail corridor; however, the statute does not address liability for damages relating to incidents at grade crossings.

The department’s duty to indemnify a freight rail operator is capped at \$200 million. The department is required to purchase up to \$200 million in liability insurance and establish a self-insurance retention fund to cover any deductible, provided that any parties covered under the insurance must pay a reasonable monetary contribution to cover the cost of the insurance. The self-insurance fund or deductible shall not exceed \$10 million. The insurance and self-insurance retention fund may provide coverage for all damages, including punitive damages.

### **SFRTA Funding**

Statutory provisions require each of the three counties served by the SFRTA to provide no less than \$2.67 million annually, dedicated by each governing body by October 1 of each year, which funds may be used for capital, operations, and maintenance.<sup>20</sup> Additionally, current law requires each county to annually fund SFRTA operations in an amount no less than \$1.565 million.<sup>21</sup> The SFRTA is currently responsible for dispatching, maintenance, and inspection of the South Florida Rail Corridor.<sup>22</sup> Having assumed such responsibility, the FDOT is statutorily required to *annually* transfer to the SFRTA a total of \$42.1 million as follows:

- \$15 million for SFRTA operations, maintenance, and dispatch; and
- \$27.1 million for operating assistance, corridor track maintenance, and contract maintenance for the SFRTA.<sup>23</sup>

In addition to these statutory amounts, the FDOT has agreed to cover 100 percent of annual maintenance costs up to \$14.4 million, with shared costs in excess of that amount, pursuant to an Operating Agreement between the FDOT and the SFRTA setting out agreed-upon percentages.<sup>24</sup> The SFRTA’s 2016 Comprehensive Annual Financial Report indicates that of the \$102.2 million in total revenue for 2016, the FDOT contributed \$55.3 million or 54 percent.<sup>25</sup>

### **The FDOT’s Oversight Role**

The SFRTA may not commit any funds provided by the FDOT without the FDOT’s approval. The FDOT may not unreasonably withhold approval. At least 90 days before advertising any procurement or renewing any existing contract using state funds for payment, the SFRTA must

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<sup>20</sup> Section 348.58(1), F.S.

<sup>21</sup> Section 348.58(3), F.S.

<sup>22</sup> *Transportation Authority Monitoring and Oversight Fiscal Year 2015 Report*, pp. 197-199, available at: <http://www.ftc.state.fl.us/documents/reports/TAMO/FY2015Report.pdf>. (Last visited March 2, 2017.)

<sup>23</sup> Section 348.58(4)(a)1., F.S.

<sup>24</sup> *Supra* note 22, p. 197.

<sup>25</sup> At p. 25, available at: <http://www.sfrta.fl.gov/docs/overview/Fiscal-Year-2016-Comprehensive-Annual-Financial-Report-FINAL.pdf>. (Last visited March 2, 2017.)

notify the FDOT of the proposed procurement or renewal and the proposed terms. If the FDOT objects in writing within 60 days of receipt of the notice, the SFRTA may not proceed. Failure of the FDOT to object within 60 days is deemed consent.<sup>26</sup> To enable the FDOT's evaluation of the SFRTA's proposed uses of state funds, the SFRTA must annually provide the FDOT with its proposed budget and with any additional documentation or information required by the FDOT.<sup>27</sup>

### **The Florida Single Audit Act/Agreements Funded with Federal or State Assistance**

Section 215.97, F.S., creates the Florida Single Audit Act. Among its stated purposes is to establish uniform state audit requirements for state financial assistance provided by state agencies to nonstate entities to carry out state projects.

- “State financial assistance” is defined to mean state resources, not including federal financial assistance and state matching on federal programs, provided to a nonstate entity to carry out a state project, including the types of state resources stated in the rules of the Department of Financial Services established in consultation with all state awarding agencies. State financial assistance may be provided directly by state awarding agencies or indirectly by nonstate entities. The term does not include procurement contracts used to buy goods or services from vendors and contracts to operate state-owned and contractor-operated facility.
- “Nonstate entity” means a local government entity, higher education entity, nonprofit organization, or for-profit organization that receives state financial assistance.

Section 215.971, F.S., requires an agreement that provides state financial assistance to a recipient or subrecipient to include all of the following:

- A scope of work that clearly establishes the tasks to be performed;
- A division of the agreement into deliverables that must be received and accepted in writing by the agency before payment. Deliverables must be directly related to the scope of work. The agreement must specify the required minimum level of service to be performed and criteria for evaluating completion of each deliverable;
- Specification of the financial consequences for failure to perform the minimum level of service.
- Specification that a recipient may expend funds only for allowable costs, and that any balance of unobligated funds and any funds paid in excess of the amount to which the recipient is entitled must be refunded to the state agency; and
- Any additional information required by the Florida Single Audit Act.

In 2016, the FDOT's Inspector General engaged in an effort “to determine the nature and extent of SFRTA's expenditures and whether their financial records were in compliance with applicable laws, rules, and regulations.”<sup>28</sup> Based on the SFRTA's response, the Inspector General requested a determination from the Department of Financial Services whether appropriations to the SFRTA constitute “state financial assistance.”<sup>29</sup> The Inspector General's report found:

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<sup>26</sup> Section 348.58(4)(c)1., F.S.

<sup>27</sup> Section 348.58(4)(c)2., F.S.

<sup>28</sup> See *Audit Report No. 141-4002*, available at: <http://www.fdot.gov/ig/Reports/141-4002%20Final.pdf>. (Last visited March 18, 2017.)

<sup>29</sup> *Audit Report* at 7.

SFRTA, as determined by the Department of Financial Services (DFS), is a Special District and a nonstate entity that is a recipient of state financial assistance.<sup>30</sup> We determined the Operating Agreement<sup>31</sup> between SFRTA and the department does not fully comply with mandatory provisions required by Section 215.971, F.S. nor does it contain the procurement provisions outlined in Chapter 287, F.S. We also determined \$153 million of state appropriations was omitted from audit coverage in accordance with the Florida Single Audit Act for fiscal years 2010/11 to 2014/15. Additionally, SFRTA did not provide a standard operating budget-to-actual expenditure report based upon the use of each grant or funding source.<sup>32</sup>

The Inspector General recommended:

- The FDOT and the SFRTA should execute a revised agreement containing the mandatory provisions per s. 297.971, F.S.;
- The SFRTA should reissue Florida Single Audit reports for fiscal years 2010-1 to 2014-15 to provide audit coverage of the \$153 million in state financial assistance previously omitted; and
- The SFRTA should provide monthly budget-to-actual expenditure reports, by each grant or other funding source, for both its operating fund and capital funds.<sup>33</sup>

### III. Effect of Proposed Changes:

**Section 1** creates s. 343.545, F.S., to provide definitions and authorizing the SFRTA to indemnify FECR and AAF for any loss, injury or damage to SFRTA's commuter rail passengers and rail corridor invitees, regardless of cause, including fault, failure, negligence, misconduct, nonfeasance, or misfeasance of FECR or AFF, subject to certain parameters. The bill authorizes the SFRTA to purchase certain railroad liability insurance and limits the SFRTA's obligation to indemnify to the insurance coverage amount. The bill also authorizes the FDOT to assume the SFRTA's obligations to indemnify and insure any freight rail service, intercity passenger rail service, and commuter rail service on an FDOT-owned rail corridor

#### *Definitions*

The bill provides various definitions relating to the act:

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<sup>30</sup> The DFS determined the SFRTA had for nine years submitted financial audit reports per s. 28.39, F.S., as a special district; that a special district as defined by statute is a unit of government created for a special purpose by a special act with jurisdiction to operate within a limited geographic boundary; that the SFRTA was created by the South Florida Regional Transportation Authority Act for the special purpose of operating and managing a transit system in Broward, Miami-Dade and Palm Beach Counties; and that the law limits operations to those counties. The DFS also noted the SFRTA is a state project (a state program that provides state financial assistance to a nonstate organization) that must be assigned a Catalog of State Financial Assistance number and, finally, since state law created the SFRTA to carry out a state project, the SFRTA is a recipient of state financial assistance. *Audit Report*, Appendix J.

<sup>31</sup> The report notes a June 2013 operating agreement between the FDOT and the SFRTA for continuing SFRC operating rights for a 14-year period that included SFRTA's agreement to conduct all activities in accordance with applicable federal and state laws and regulations and the operating rules, policies, and procedures adopted pursuant to such laws and regulations. *Id.* at 5.

<sup>32</sup> *Audit Report* at 1.

<sup>33</sup> *Id.*

- “Rail corridor,” means the portion of a linear contiguous strip of real property which is used for rail service and owned by FECR or owned or controlled by AAF. The term applies *only when* the [SFRTA] has, by contract, assumed the obligation to forever protect, defend, indemnify, and hold harmless FECR, AAF, or their successors [in accordance with the bill’s provisions] and acquired an easement interest, a lease, a right to operate, or a right of access. The term includes structures essential to railroad operations, including the land, structures, improvements, rights-of-way, easements, rail lines, rail beds, guideway structures, switches, yards, parking facilities, power relays, switching houses, rail stations, any ancillary development, and any other facilities or equipment used for the purposes of construction, operation, or maintenance of a railroad that provides rail service.
- “SFRTA rail corridor invitee” means any rail corridor invitee who is SFRTA’s commuter rail passenger or is otherwise present on the rail corridor at the request of, pursuant to a contract with, for the purpose of doing business with, or at the behest of SFRTA. The term does not include:
  - Patrons at any station, except those patrons who are also SFRTA’s commuter rail passengers;
  - Any person present on the rail corridor who is a patron of the non-SFRTA commuter rail service or is meeting or assisting a person who is a patron of the non-SFRTA commuter rail service;
  - Commercial or residential tenants of the developments in and around the stations or their invitees; or
  - Any third parties performing work at a station or in the rail corridor, such as employees and invitees of “PI”<sup>34</sup> or related entities, utilities, and fiber optic companies or others, or invitees or employees of the department or any county or municipality.
- “AAF rail corridor invitee,” means any rail corridor invitee who is an AAF intercity rail passenger or is otherwise present on the rail corridor at the request of, pursuant to a contract with, or otherwise for the purpose of doing business with or at the behest of AAF, including vendors or employees of vendors at the MiamiCentral<sup>35</sup> station or any other station that AAF may construct on the rail corridor. The term does not include:
  - Patrons at any station, except those patrons who are also AAF’s intercity rail passengers;
  - Commercial or residential tenants of the developments in and around the stations of their invitees; or
  - Any third parties performing work at a station or in the rail corridor, such as employees and invites of PI or related entities, utilities, and fiber optic companies, or invitees or employees of the FDOT or any county or municipality.
- “FECR rail corridor invitee,” means any rail corridor invitee who is present on the rail corridor at the request of, pursuant to a contract with, or otherwise for the purpose of doing business with or at the behest of FECR. The term does not include patrons at any station, nor the same commercial or residential tenants or third parties referenced in the “AAF rail corridor invitee” definition above.
- “Rail corridor invitee,” means any person who is on or about the rail corridor in which the AAF, SFRTA, or the non-SFRTA commuter rail service operator has an easement interest, a lease, a right to operate, or a right of access, and who is:

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<sup>34</sup> “PI” means FDG Flagler Station II, LLC, which has an easement on the rail corridor for nonrail uses.

<sup>35</sup> “MiamiCentral” means the primary All Aboard Florida station located in downtown Miami, which includes exclusive areas used by the [SFRTA] for commuter rail service.



- Present at the behest of an AAF, an SFRTA, a FECR, or the non-SFRTA commuter rail service operator for any purpose;
- Otherwise entitled to be on or about the rail corridor; or
- Meeting, assisting, or in the company of any person described above.
- “Non-SFRTA commuter rail service,” means AAF’s operation, or an AAF third-party designee’s operation, of trains in any commuter rail service on the rail corridor which is not SFRTA’s commuter rail service. The term does not include:
  - Any service operated by the [SFRTA] between MiamiCentral station and any stations in Miami-Dade County, Broward County, Palm Beach County, or points north on the FECR rail corridor; and
  - SFRTA’s commuter rail service on the South Florida Rail Corridor owned by the [FDOT].
- “Other train,” means a train that is not SFRTA’s train, FECR’s train, AAF’s train, a train of a non-SFRTA commuter rail service operator, or a train of any other operator of intercity rail passenger service and must be treated as a train of the entity that made the initial request for the train to operate on the rail corridor.
- “Limited covered accident,” means:
  - A collision directly between the trains, locomotives, rail cars, or rail equipment of SFRTA and FECR only, where the collision is caused by or arising from the willful misconduct of FECR or its subsidiaries, agents, licensees, employees, officers, or directors, as adjudicated pursuant to a final and unappealable court order, or if punitive damages or exemplary damages are awarded due to the conduct of FECR or its subsidiaries, agents, licensees, employees, officers, or directors, as adjudicated pursuant to a final and unappealable court order; or
  - A collision directly between the trains, locomotives, rail cars, or rail equipment of SFRTA and AAF only, where the collision is caused by or arising from the willful misconduct of AAF or its subsidiaries, agents, licensees, employees, officers, or directors, as adjudicated pursuant to a final and unappealable court order, or if punitive damages or exemplary damages are awarded due to the conduct of AAF or its subsidiaries, agents, licensees, employees, officers, or directors, as adjudicated pursuant to a final and unappealable court order.

In a limited covered accident, AAF’s or FECR’s willful misconduct must be “adjudicated by a court until all appeals are exhausted.” This requirement is not in the provisions of s. 341.302, F.S., related to FDOT’s liability with respect to the SunRail project.

The bill also defines the following terms: All Aboard Florida or AAF, AAF intercity rail passenger, commuter rail passenger, commuter rail service, existing IRIS crossing, Florida East Coast Railway or FECR, freight rail service, intercity passenger rail service, joint infrastructure, non-SFRTA commuter rail service operator, passenger easement, SFRC, and South Florida Regional Transportation Authority or SFRTA.

### *Assumption of Indemnity and Insurance Obligations*

The bill authorizes the SFRTA to indemnify and protect FECR and AAF<sup>36</sup> from any liability, cost, or expense, including without limitation SFRTA's commuter rail passengers and rail corridor invitees in the rail corridor, regardless of whether the loss, damage, destruction, injury, or death is caused by the fault, failure, negligence, misconduct, nonfeasance, or misfeasance of FECR or AAF. The contractual indemnification, however, is subject to the following:

- The SFRTA is solely responsible (pays 100 percent) for any loss, injury, or damage to SFRTA commuter rail passengers, invitees, or trespassers, other than passengers or invitees of the non-SFRTA commuter rail service, regardless of circumstances or cause, subject to the following:
- FECR or AAF, as applicable, and with respect to a limited covered accident, must defend and indemnify the SFRTA for the amount of the self-insurance retention account (discussed below).
- If only an SFRTA train is involved in an incident, including incidents with trespassers or at at-grade crossings, the SFRTA is solely responsible (pays 100 percent).
- If only an FECR train or only an AAF train is involved in an incident, including incidents with trespassers or at at-grade crossings, FECR or AAF, as applicable, is solely responsible (pays 100 percent), except for loss, injury, or damage to SFRTA's commuter rail passengers, employees, and invitees.
- In an incident involving any "other train" that is not an SFRTA train, the other train is treated as an SFRTA train solely for purposes of allocation of liability between the SFRTA and the FECR, or between the SFRTA and AAF, as applicable, who share equal responsibility as to third parties outside the rail corridor who incur loss, injury, or damage as a result of any incident involving both the SFRTA's train and the FECR's train, or both the SFRTA's train and AAF's train, as applicable. The allocation as between the SFRTA and the FECR, or between the SFRTA and AAF, as applicable, remains one-half each as to third parties outside the rail corridor. The involvement of any other train does not alter the sharing of equal responsibility as to third parties outside the rail corridor.
- If only an SFRTA train and an FECR train, or only an "other train" (that is by definition considered an SFRTA train) and an FECR train, are involved in an incident, the SFRTA is responsible (pays 100 percent) for its property, commuter rail passengers, employees, and invitees. The FECR is responsible for its property, employees, and invitees. The SFRTA and the FECR each share one-half responsibility as to joint infrastructure<sup>37</sup> and rail corridor invitees who are not SFRTA invitees or FECR invitees, including, but not limited to, trespassers or third parties outside the rail corridor.
- If only an SFRTA train and an AAF train, or only an "other train" (that is by definition considered an SFRTA train) and an AAF train, are involved in an incident, the SFRTA is responsible (pays 100 percent) for its property, commuter rail passengers, employees, and invitees. AAF is responsible for its property, intercity rail passengers, employees, and invitees. The SFRTA and AAF each share one-half responsibility as to joint infrastructure

<sup>36</sup> For as long as AAF and FECR or their successors agree to indemnify the SFRTA in accordance with the bill's provisions.

<sup>37</sup> Defined to mean any portion or segment of the rail corridor which does not contain tracks or infrastructure designated for the exclusive use of the SFRTA, AAF, or the FECR and portions of the MiamiCentral station used by both AAF and SFRTA, including, but not limited to, stairs, elevators, and escalators.

and non-SFRTA and non-AAF invitees, as well as to trespassers and third parties outside the rail corridor.

- If an FECR train, an SFRTA train, and an AAF train are involved in an incident, the SFRTA is responsible for its property, commuter rail passengers, employees, and invitees. AAF is responsible for its property, employees, intercity rail passengers, and invitees. The FECR is responsible for its property, employees, and invitees, and invitees. The SFRTA, the FECR, and AAF each share one-third responsibility as to joint infrastructure and rail corridor invitees who are not SFRTA invitees, AAF invitees, or FECR invitees, including trespassers or third parties outside the rail corridor.
- If an SFRTA train, an FECR train, and an AAF train are involved in an incident, the bill allocates one-third of any liability each to the SFRTA, the FECR, and AAF as to third parties outside the rail corridor.
- If an SFRTA train, an FECR train, and any other train; or if an SFRTA train, an AAF train and any other train, are involved in an incident, the bill allocates one-third of any liability each to the SFRTA, the FECR, and the other train; or to the SFRTA, AAF, and the other train, as applicable, as to third parties outside the rail corridor.

The bill provides that the SFRTA is not obligated to indemnify the FECR and AAF for any amount in excess of required insurance coverage, but the SFRTA remains responsible for the indemnity obligation up to the insurance coverage limit. If non-SFRTA commuter rail service is provided by an entity under contract with AAF, the SFRTA may elect at its sole discretion to provide the same insurance coverage and indemnity to any non-SFRTA commuter rail service operator.

The bill authorizes the SFRTA to purchase railroad liability insurance of \$295 million per occurrence, adjusted in accordance with applicable law,<sup>38</sup> with a \$5 million self-insurance retention account, known as the “SFRTA insurance program.” At the SFRTA’s sole discretion, the insurance program may cover the obligations described in the bill or any other service operated by the SFRTA on a rail corridor. All definitions, terms, conditions, restrictions, exclusions, obligations, and duties included in any of the insurance policies procured by the SFRTA for the insurance program apply to the self-insurance retention account and its application to claims against the applicable insureds.

The SFRTA must name the FECR and AAF as insureds on any policies it procures at no cost to the FECR or AAF and ensure that all policies have a waiver of exclusion for punitive damages and coverage for claims made pursuant to the Federal Employers Liability Act.<sup>39</sup> Such policies must include coverage for terrorism and pollution, including, but not limited to, coverage applicable in the event of a railroad accident, a derailment, or an overturn, and evacuation expense.

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<sup>38</sup> See 49 U.S.C. s. 28103. In January of this year, the U.S.D.O.T. Secretary published its Notice of Adjustment to Rail Passenger Transportation Liability Cap under s. 11415 of the Fixing America’s Surface Transportation Act, raising the transportation liability cap from \$200 million to just under \$295 million. See the notice at: <https://www.gpo.gov/fdsys/pkg/FR-2016-01-11/pdf/2016-00301.pdf>. (Last visited March 17, 2017.)

<sup>39</sup> 45 U.S.C. 51 *et seq.* This act protects and compensates railroad workers injured on the job, if the worker can prove that the railroad was at least partly legally negligent in causing the injury.

**Section 6** amends s. 341.302(17), F.S., adding a new paragraph (d), to authorize the FDOT to assume the SFRTA's obligations to indemnify and insure freight rail service, intercity passenger rail service, and commuter rail service on an FDOT-owned rail corridor, whether ownership is in fee or by easement, or on a rail corridor where the FDOT has the right to operate. The FDOT notes that this authority would provide a financial advantage to SFRTA that is not offered to other authorities or transit operations.<sup>40</sup>

***The SFRTA, the FDOT's Oversight Role, and State Funds Transfer***

**Section 4** amends s. 343.54, F.S., relating to the powers and duties of the SFRTA, to prohibit the SFRTA from entering into, extending, or renewing any contract or other agreement that may be funded with FDOT-provided funds without the prior review and written approval by the FDOT of the proposed expenditures.

**Section 5** amends s. 343.58(4), F.S., deeming funds provided to the authority by the FDOT under that section to be state financial assistance provided to a nonstate entity to carry out a state project subject to the provisions of ss. 215.97 and 215.971, F.S. The FDOT is directed to provide the funds in accordance with the terms of a written agreement to be entered into between the SFRTA and the FDOT. The agreement must provide for FDOT review, approval, and audit of the SFRTA's expenditure of such funds and must include such other provisions as are required by applicable law. The FDOT is expressly authorized to advance the SFRTA one-fourth of the total funding provided under that section for a state fiscal year at the beginning of each state fiscal year. Thereafter, the bill requires monthly payments over the fiscal year on a reimbursement basis as supported by invoices and such additional documentation and information as the FDOT may reasonably require, and a reconciliation of the advance against remaining invoices in the last quarter of the fiscal year.

This section to remove the existing provisions relating to the FDOT's oversight role, except for requiring the SFRTA to annually provide the FDOT with its proposed budget and to *promptly* provide the FDOT with any additional documentation or information required by the FDOT for its evaluation of SFRTA-proposed uses of state funds.

**Section 2** amends s. 343.52, F.S., to define "department" to mean the Department of Transportation.

**Section 3** amends s. 343.53, F.S., revising a cross-reference to conform to changes made by the act.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

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<sup>40</sup> See the FDOT's analysis of SB 842. (On file in the Senate Transportation Committee.)

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The FECR and AAF would benefit as named insureds under the required insurance policy without contributing towards the cost of the insurance.

C. Government Sector Impact:

The FDOT and the SFRTA may experience administrative expenses associated with the FDOT's review, written approval, and audit of the SFRTA's proposed expenditures using any FDOT-provided funding.

The cost to SFRTA for the purchase of liability insurance and to establish a self-insurance retention fund for the purpose of paying the deductible limit established in the insurance policies is unknown at this time.

The bill expands the FDOT's authority to indemnify intercity passenger rail service and commuter rail service. The expansion overlaps, at least in part, the FDOT's existing authority to indemnify freight rail service in s. 341.302, F.S. To the extent that FDOT assumes the SFRTA's obligations to indemnify and insure freight rail service, intercity passenger rail service, and commuter rail service, there would be an indeterminate cost to the state for insurance premiums and any payments from the self-insurance retention fund.

**VI. Technical Deficiencies:**

The bill defines the terms, "existing IRIS crossing" and "passenger easement," but the terms are not used elsewhere in the bill.

For purposes of clarity, the conjunctive "or" on line 251 may need to be modified to reflect the relationship between subparagraphs in newly created s. 343.545(2)(a), F.S.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill amends the following sections of the Florida Statutes: 343.52, 343.53, 343.54, 343.58 and 341.302.

This bill creates the following sections of the Florida Statutes: 343.545.

**IX. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**Recommended CS/CS by Appropriations Subcommittee on Transportation, Tourism, and Economic Development on April 13, 2017:**

The CS removes the existing provisions relating to the FDOT's oversight role and prohibits the SFRTA from entering into, extending, or renewing any contract or other agreement that may be funded with FDOT-provided funds without the prior review and written approval by the FDOT of the proposed expenditures. Additionally, the CS:

- Deems funds provided to the SFRTA by the FDOT to be state financial assistance provided to a nonstate entity to carry out a state project subject to the provisions of ss. 215.97 and 215.971, F.S.;
- Directs the FDOT and the SFRTA to enter into a written agreement pursuant to which the FDOT will provide the required statutory funding and which must provide for FDOT review, approval, and audit of the SFRTA's expenditure of such funds;
- Authorizes the FDOT to advance the SFRTA one-fourth of the required statutory funding at the start of each fiscal year, with monthly payments over the fiscal year on a reimbursement basis supported by invoices, and a reconciliation in the last quarter of the fiscal year.

**CS by Transportation on March 22, 2017:**

The CS removes from the bill provision that the state funds transferred from the STTF to the SFRTA pursuant to s. 343.58, F.S., may not be considered state financial assistance subject to the Florida Single Audit Act, s. 215.97, F.S., or to the requirements for inclusion of specified provisions in agreements funded with federal or state assistance under s. 215.971, F.S.

**B. Amendments:**

None.