**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.)

Prepared By: The Professional Staff of the Committee on Infrastructure and Security

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| BILL: | CS/SB 676 |
| INTRODUCER: | Infrastructure and Security Committee and Senator Mayfield |
| SUBJECT: | High-speed Passenger Rail Safety |
| DATE: | January 22, 2020 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Price | Miller | IS | **Fav/CS** |
| 2. | | | ATD | |
| 3. | | | AP | |

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

COMMITTEE SUBSTITUTE - Substantial Changes

## I. Summary:

CS/SB 676 creates the Florida High-Speed Passenger Rail Safety Act. Specifically, the bill provides a short title, definitions relating to the act, Legislative intent, and applicability; and requires the Florida Department of Transportation (FDOT) to regulate certain railroad companies in this state to the extent not preempted by federal law. By January 1, 2021, the bill requires the FDOT to adopt minimum standards for public railroad-highway grade crossing design and installation of safety equipment, use of sealed corridors at such crossings, and field surveys for determining areas where fencing is necessary to protect the public. The bill authorizes the FDOT to impose an administrative penalty of up to $10,000 for each violation of the FDOT rules.

The bill imposes certain accident-related reporting requirements on railroad companies and the FDOT, as well as railroad reporting requirements, Florida Division of Emergency Management (FDEM) training responsibilities, and FDOT rulemaking duties with respect to unplanned releases of liquefied natural gas. The bill specifies that the railroad reporting requirements are for informational purposes only and may not be used to economically regulate a railroad company.

The bill also assigns to railroad companies responsibility for certain costs incurred due to installation of safety improvements; but provides the newly created section of law may not be construed to impair existing contractual agreements between a railroad company operating a high-speed passenger rail system and a governmental entity within the state.

The bill raises a number of federal preemption issues as discussed in more detail throughout the remainder of this analysis.

The bill may have an indeterminate negative fiscal impact on the private sector and on state governments, and an indeterminate positive fiscal impact on local governments to the extent that future costs are avoided. See Section V. Fiscal Impact Statement for details.

## II. Present Situation:

Following general discussion of current and relevant federal and state provisions of law, the present situation for each section of the bill is discussed below in conjunction with the Effect of Proposed Changes.

### The Federal Regulatory Framework for Railroad Activities

The reach of federal law and regulations relating to various aspects of rail activities is extensive. Recognition of the need to regulate railroad operations at the federal level to provide uniformity, and Congress' authority under the Commerce Clause[1] to regulate the railroads, is well established.[2] The U.S. Supreme Court has on numerous occasions recognized the preemptive effect of federal regulation of railroads, a scheme that is "among the most pervasive and comprehensive."[3] State and local regulation is often, but not always, preempted. A number of federal laws apply, but the following relevant federal provisions often involve questions of preemption of state and local efforts to regulate railroad activities.

#### *The Interstate Commerce Commission Termination Act of 1995*

The Interstate Commerce Commission Termination Act of 1995 (ICCTA)[4] granted to the Surface Transportation Board (STB) exclusive jurisdiction, previously exercised by the Interstate Commerce Commission,[5] over:

- Transportation by rail carriers[6] and the remedies provided with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- The construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state.

Except as otherwise provided, the remedies "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."[7]

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[1] U.S. Const. art. VI.
[2] *See City of Auburn v. United States*, 154 F.3d 1025 (9th Circuit 1998).
[3] *See, e.g., Chicago & N.W. Transp. Co v. Kalo Brick & Tile Co.,* 450 U.S. 311, 318 (1981).
[4] 49 U.S.C. 10101 *et seq.*
[5] ICCTA abolished the Interstate Commerce Commission.
[6] Defined to mean a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation. 49 U.S.C. 10102(5).
[7] 49 U.S.C. 10501(b).

State or local attempts to intrude into matters directly regulated by the STB; e.g., railroad rates, services, construction, or abandonment, are categorically preempted. ICCTA also prevents state or local imposition of requirements that could be used to deny a railroad the right to conduct rail operations or proceed with activities authorized by the STB. Even if a state or local requirement is not categorically preempted, state and local attempts to impose requirements on railroads may be preempted as applied; i.e., if the requirements unreasonably burden or interfere with rail transportation.[8]

Thus, ICCTA preempts regulations that unreasonably interfere with railroad operations that come within the STB's jurisdiction, regardless of whether the STB actively regulates the particular activity involved. ICCTA is broad and far-reaching, but "state and local actions taken under their retained police powers" are not preempted "as long as they do not unreasonably interfere with railroad operations or the Board's regulatory programs."[9]

"States and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect the public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions."[10]

A conclusion as to whether a state or local regulation is preempted "requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation."[11]

***The Federal Railroad Safety Act***

The purpose of the federal rail safety program is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.[12] The program is implemented through mandatory federal safety requirements and through joint efforts of FRA and state inspections to determine compliance of railroads, shippers, and manufacturers with the federal requirements.[13]

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[8] Surface Transportation Board Decision, Docket No. FD 35792, Decided October 29, 2014 (citations omitted), available at: https://www.stb.gov/decisions/readingroom.nsf/cac42df635267da4852572b80041558c/2c4e7a01a148e0a385257d8200477be9?OpenDocument (last visited January 17, 2020). However, the Board has determined that the All Aboard Florida rail line is not part of the interstate rail network and does not come within the Board's jurisdiction. *See Surface Transportation Board Decision*, Docket No. FD 35680, available at: https://www.stb.gov/Decisions/readingroom.nsf/WEBUNID/3742BD042B141CAA85257ADB0079675B (last visited January 17, 2020).

[9] ICCTA preempts more than explicit economic regulation. While "Congress was particularly concerned about state *economic* regulation of railroads when it enacted the ICCTA[,]" "[w]hat matters is the degree to which the challenged regulation burdens rail transportation…," not the label placed on the regulation, economic or otherwise. "The ICCTA 'completely preempts state laws (and remedies based on such laws) that directly attempt to manage or govern a railroad's decisions in the economic realm." *See Town of Atherton v. California High-Speed Rail Authority*, 228 Ca.App.4th 314, 331 (July 24, 2014) (citations omitted).

[10] *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1133 (10th Cir. 2007), citing *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) (internal quotation marks omitted). *Emerson* collects, with citations, a number of examples of circumstances under which ICCTA preemption did and did not apply.

[11] *Id.*

[12] 49 U.S.C. 20101.

[13] *See* 49 C.F.R. 212.101.

The general rule with respect to railroad safety and security calls for national uniformity to the extent practicable. Like the ICCTA, the Federal Railroad Safety Act (FRSA) may also preempt state and local actions. The FRSA in 49 U.S.C. s. 20106 contains an express preemption provision authorizing a state to adopt or continue in force a law, regulation, or order related to rail safety or security until the Secretary of Transportation (as to railroad safety) or the Secretary of Homeland Security (as to railroad security) issues a regulation or order covering the subject matter of the state requirement.

Additionally, a state may adopt or continue a more stringent law, regulation or order relating to railroad safety or security if the law, regulation, or order:

- Is necessary to eliminate or reduce an essentially local safety hazard;
- Is not incompatible with a law, regulation, or order of the United States Government; and
- Does not unreasonably burden interstate commerce.[14]

***The Federal Hazardous Material Transportation Law***

The purpose of the Federal Hazardous Materials Transportation Law (HMTL)[15] "is to protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce.[16] The United State Department of Transportation (U.S.D.O.T.) secretary is charged with prescribing regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.[17] A number of federal agencies share enforcement. One of the FRA's primary emphases is on the transportation or shipment of hazardous material by rail.

The HMTL also contains express preemption provisions. Except as otherwise provided, a state or local requirement relating to rail safety or security is preempted if:

- Complying with the state or local requirement and a federal requirements is not possible;[18]
- A state or local requirement, as applied or enforced, is an obstacle to carrying out a federal safety requirement or regulation or security regulation or directive; [19]
- A state or local requirement relating to any of the following is not substantively the same as a federal requirement:
    - The designation, description, and classification of hazardous material;
    - The packing, repacking, handling, labeling, marking, and placarding of hazardous material;

[14] The FRSA was amended in 2007 to clarify that the preemption provision does not preempt an action under state law *seeking damages for personal injury, death, or property damage* alleging a party failed to comply with the Federal standard of care established by the Transportation or Homeland Security secretaries covering the subject matter; failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the secretaries; or has failed to comply with a state law, regulation, or order not incompatible with 49 U.S.C. s. 20106(a)(2)..
[15] 49 U.S.C. 5101-5128.
[16] 49 U.S.C. 5101.
[17] 49 U.S.C. 5103
[18] Labeled the "dual compliance" test. *See* discussion of federal preemption in *Preemption Determination No. PD-18(R), Broward County, Florida's Requirements on the Transportation of Certain Hazardous Materials to or From Points in the* County, at p. 81951, available at: https://www.federalregister.gov/documents/2000/12/27/00-32885/preemption-determination-no-pd-18r-broward-county-floridas-requirements-on-the-transportation-of. . (Last visited October 30, 2017.)
[19] Labeled the "obstacle" test. *Id.*

- The preparation, execution, and use of shipping documents related to hazardous material and requirement related to the number, contents, and placement of those documents;
- The written notification, recording, and reporting of the unintentional release in transportation of hazardous material and other written hazardous materials transportation incident reporting involving State or local emergency responders in the initial response to the incident; and
- The designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transportation hazardous material in commerce.[20]

Section 5125(d) of 49 U.S.C. authorizes a person (including a state, political subdivision of a state, or Indian tribe) directly affected by a requirement of the state, political subdivision or Indian tribe to apply to the U.S.D.O.T. secretary for a determination of whether such a requirement is preempted.

A state, political subdivision, or Indian tribe may also in some cases apply to the secretary for a waiver of preemption, and the secretary may waive preemption if the given requirement provides the public at least as much protection as do the federal HMTL provisions and regulations and is not an unreasonable burden on commerce.[21]

***Recent Federal Railroad Administration Rule***

Effective in January of 2019, the FRA issued a final rule amending the FRA's passenger equipment safety standards governing the construction of conventional and high-speed passenger rail equipment. Among other items, the rule adds a new tier of passenger equipment safety standards for interoperable high-speed passenger rail service at speeds up to 220 mph. Under the rule, these trainsets are required to operate in exclusive rights-of-way without grade crossings at speeds above 125 mph, but these trains are authorized to share the right-of-way with freight trains and other tiers of passenger equipment at speeds not exceeding 125 mph.[22]

**Rail Programs and Activity in Florida**

Section 341.302, F.S., prescribes the duties and responsibilities of the FDOT in relation to Florida's rail program. The FDOT, in conjunction with other governmental units and the private sector, is directed to develop and implement a statewide rail program ensuring "the proper maintenance, safety, revitalization, and expansion of the rail system" necessary to respond to statewide mobility needs.[23] The rail system plan must identify the priorities, programs, and funding levels required to meet statewide needs and assure the maximum use of existing facilities along with the integration and coordination of the various modes of transportation in the most cost-effective manner possible.[24] The FDOT is required to update the rail system plan every

[20] Labeled the "substantively the same as" test. *Supra* note 18.
[21] 49 U.S.C. 5125.
[22] The final rule is available at: https://www.apta.com/wp-content/uploads/FRA-2013-0060-0016.pdf (last visited January 18, 2020.)
[23] Section 341.302, F.S.
[24] Section 341.302(3), F.S.

two years and to include plans for both passenger and freight rail service.[25] The FDOT is also directed to promote and facilitate the implementation of advanced rail systems, including high-speed rail.[26]

***Commuter 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. Today, the commuter rail system (Tri-Rail) is operated by the South Florida Regional Transportation Authority and continues to serve Miami-Dade, Broward, and Palm Beach counties.[27]

In addition, in 2007, the FDOT entered into an agreement with CSX to purchase 61.5 miles of track or right-of-way in Central Florida to provide commuter rail service. Known as SunRail, the first phase of the project opened in 2014, connecting DeBary in Volusia County to Sand Lake Road in Orange County and featuring 12 Central Florida stations.[28] The FDOT operates the SunRail system, and CSX continues to operate freight trains in the corridor.

SunRail's southern expansion into Osceola County began in 2016 and opened in 2018, connecting Sand Lake Road in Orange County to Poinciana in Osceola County, with a 17.2-mile segment featuring four additional stations.[29] Northern expansion plans are expected to link DeBary to DeLand in Volusia County. This project is a 12-mile segment, adding one station to the existing system.[30]

***High-Speed Rail/Florida Rail Enterprise***

In November of 2000, the Florida voters approved a constitutional amendment[31] mandating the construction of a high-speed transportation system for the state. The amendment required the use of train technologies that operate at speeds in excess of 120 miles per hour. The high-speed rail system was to link the five largest urban areas in Florida, and construction was mandated to begin by November 1, 2003. To implement the constitutional amendment, the Florida Legislature enacted the Florida High-Speed Rail Authority Act[32] and created the Florida High-Speed Rail Authority in 2002. In November 2004, Florida voters approved repeal of the high-speed rail constitutional amendment.

In 2009, the Legislature repealed the Florida High-Speed Rail Authority and re-named the Florida High-Speed Rail Act as the Florida Rail Enterprise Act.[33] In place of the Authority, the

[25] *Id*.
[26] Section 341.302(2), F.S.
[27] *See* the Tri-Rail website under the *Destinations* tab, available at: http://www.tri-rail.com/# (last visited January 17, 2020).
[28] *See* the SunRail website available at: http://corporate.sunrail.com/stations-trains/phase-1-stations/. (Last visited October 30, 2017).
[29] *See* the SunRail website available at: http://corpsunrail.wpengine.com/stations-trains/southern-expansion-stations/ (last visited January 17, 2020).
[30] *See* the SunRail website available at: http://corpsunrail.wpengine.com/stations-trains/northern-expansion-stations/ (last visited January 17, 2020)..
[31] Section 19, Article X of the State Constitution.
[32] Sections 341.8201 through 341.842, F.S. (2002).
[33] Chapter 2009-271, L.O.F.

Legislature established the Florida Rail Enterprise as part of the FDOT[34] and directed the Enterprise to locate, plan, design, finance, construct, maintain, own, operate, administer, and manage the high-speed rail system in the state.[35] The Legislature also created the Florida Statewide Passenger Rail Commission to advise the FDOT on policies and strategies for a coordinated statewide system of passenger rail services, and evaluating passenger rail policies and provided advice and recommendations. The Commission was abolished in 2014.[36]

Section 341.822, F.S., authorizes the Rail enterprise to plan, construct, maintain, repair, and operate a high-speed rail system, to acquire corridors, and to coordinate the development and operation of publicly funded passenger rail systems in the state. The FDOT is the only governmental entity authorized to acquire, construct, maintain, or operate the high-speed rail system.[37]

***The All Aboard Florida Project***

Florida East Coast Industries (FECI) was incorporated in 1983 and became the holding company for the Florida East Coast Railway (FECR).[38] In 2007, Fortress Investment Group (Fortress) acquired FECI.[39] All Aboard Florida (AAF) is part of FECI.[40] In 2017, Japanese-based SoftBank agreed to purchase Fortress, and Grupo Mexico acquired the FECR.[41]

AAF is an express train service, called "Brightline,"[42] which uses the existing FECR corridor between Miami and Cocoa. AAF will build new track along State Road 528 between Cocoa and Orlando.[43] Brightline recently announced a partnership and trademark licensing agreement with the Virgin Group, under which Brightline has been renamed to Virgin Trains USA.[44] Currently, the service operates with three stations, one each in Miami, Fort Lauderdale, and West Palm

[34] *See* s. 20.23(4)(a), F.S.
[35] Section 341.822, F.S.
[36] Chapter 2014-223, L.O.F.
[37] Defined in s. 341.8203(4), F.S., to mean any high-speed fixed guideway system for transporting people or goods, which system is, by definition of the United States Department of Transportation, reasonably expected to reach speeds of at least 110 miles per hour, including but not limited to, a monorail system, dual track rail system, suspended rail system, magnetic levitation system, pneumatic repulsion system, or other system approved by the enterprise. The term is broadly defined and includes a long list of additional items in the definition.
[38] *See* the Florida East Coast Railway website available at: https://fecrwy.com/history/ (last visited January 17, 2020).
[39] *See* article *Fortress to buy Florida East Coast for $3.5 billion, available at: https://www.reuters.com/article/us-floridaeastcoast-takeover/fortress-to-buy-florida-east-coast-for-3-5-billion-idUSBNG23960820070508* (last visited January 17, 2020).
[40] *See* the brightline website available at: https://www.gobrightline.com/about-us (last visited January 17, 2020).
[41] *See* the respective articles, *Fortress Shareholders Approve Proposed Acquisition by SoftBank*, available at: http://www.4-traders.com/FORTRESS-INVESTMENT-GROUP-42554/news/Fortress-Investment-LLC-07-12-17-Fortress-Shareholders-Approve-Proposed-Acquisition-by-SoftBank-24748345/, and, *Grupo Mexico Completes Florida East Coast Acquisition*, available at: http://www.railjournal.com/index.php/north-america/grupo-mexico-completes-florida-east-coast-acquisition.html (last visited January 17, 2020).
[42] See the brightline website available at: https://www.gobrightline.com/routes-stations (last visited January 18, 2020).
[43] *Infra* note 46.
[44] See the Virgin website available at https://www.virgin.com/news/virgin-and-brightline-form-strategic-partnership (last visited January 17, 2020).

Beach, with future plans for an additional station in Orlando.[45] Brightline also submitted an unsolicited proposal to the FDOT for a high-speed rail connection from Orlando to Tampa.[46]

According to AAF, Brightline will travel at speeds between 79 and 125 miles per hour. Between Miami and West Palm, the trains will travel up to 79 mph; between West Palm to Cocoa, up to 110 mph; and from Cocoa to Orlando, up to 125 mph, with actual speed varying depending on corridor conditions and configurations.[47]

Cities and counties along Florida's east coast reportedly have existing crossing agreements with Florida East Coast Railway. Under those agreements, the local governments usually have financial responsibility for crossing signal installations, capital improvements for track beds and roadway surfaces, crossing maintenance costs, and pedestrian gates and sidewalks.[48] AAF reportedly wishes to be named a third-party beneficiary in those agreements already in place[49] and reportedly has accomplished that goal, at least in some cases.[50] At least one local government has reportedly entered into new agreements with AAF identifying responsibility for safety upgrades and maintenance.[51]

***OPPAGA Study - Florida Passenger Rail System Study***

The 2018 General Appropriations Act directed the Office of Program Policy Analysis and Government Accountability (OPPAGA) to contract with an independent consultant to study existing and planned passenger rail, including high speed passenger rail, in the state.[52] To complete this study, OPPAGA contracted with CPCS Transcom Inc., a company that provides consulting services in the areas of transportation and infrastructure, including rail operations and safety. The study examined both various aspects of Florida's passenger rail systems and the FDOT's role in oversight of passenger rail with respect to maintenance, safety, revitalization, and expansion.

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[45] *See* the brightline website available at: https://www.gobrightline.com/routes-stations (last visited January 14, 2020).
[46] *See FDOT beings process for privately funded Orlando-to-Tampa high-speed rail*, available at: https://csengineermag.com/fdot-begins-process-for-privately-funded-orlando-to-tampa-high-speed-rail/ (last visited January 17, 2020).
[47] *See* video of the House Transportation & Infrastructure Subcommittee workshop on high-speed passenger rail, February 22, 2017, available at: http://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2017021306&committeeID=2914 (last visited January 17, 2020).
[48] *See* Martin County document, *Direct Costs to Treasure Coast from High-Speed Rail* (on file in the Senate Infrastructure and Security Committee).
[49] *See* article, *Two votes today could clear way for All Aboard Florida,* available at: http://realtime.blog.palmbeachpost.com/2014/10/21/does-all-aboard-floridas-fate-hinge-on-brevard-county-vote/ (last visited January 17, 2020). *See also* article *Boynton May Sign Agreement With All Aboard,* available at: https://www.citizensagainstthetrain.com/content/boynton-may-sign-agreement-all-aboard (last visited January 17, 2020).
[50] *See* article, *Miami Certain, Brevard Skeptical but both give approval to fund bonds to advance rail project*, available at: http://www.floridanotallaboard.net/news/miami-certain-brevard-skeptical-but-both-counties-give-approval-to-fund-bonds-to-advance-rail-project/ (last visited January 17, 2020).
[51] *See* article, *Boynton signs All Aboard Florida agreement against residents' wishes*, available at: http://spbc.blog.palmbeachpost.com/2014/10/08/boynton-signs-all-aboard-florida-agreement-against-residents-wishes/ (last visited January 17, 2020).
[52] *See* proviso under specific appropriation 2673 of Chapter 2018-9, Laws of Florida, pp. 356-357, available at: http://laws.flrules.org/2018/9 (last visited January 17, 2020).

The OPPAGA study examined passenger rail systems in Florida under the jurisdiction of the Federal Railroad Administration, including Amtrak, Brightline, SunRail, and Tri-Rail.[53] The study included three components:

- A detailed inventory and description of the Florida Passenger Rail System focusing on operating passenger railroad companies and planned passenger rail projects.
- An analysis of incident data involving passenger rail operations and grade crossings.
- An overview of jurisdictions that regulate passenger rail operations on a federal, state, regional and local level, including the establishment and expansion of services; reporting of railroad incidents and rectification of safety issues; and maintenance of tracks, crossing and safety equipment.

The report contained various broad recommendations related to passenger rail operations, safety, and railroad policy in Florida with accompanying legislative and FDOT considerations that are summarized in the report, under six categories:

- Updating FDOT's Mandate,
- Setting New Regulations for Higher Speed Rail,
- Implementing State of the Art Practices,
- Enforcing Railroad Trespass Violations,
- Reviewing Rail Safety Funding Resources, and
- Continuing Research to Promote Public Safety Along Railroads.[54]

The report additionally focuses on specific "gaps" in existing regulations with respect to certain aspects of operation of passenger service at speeds between 81 and 125 mph. Noting that responsibility for the gaps does or could rest with the FDOT, the report identifies those gaps as follows:

- Grade crossing minimum design standards,
- Certification of new passenger rail lines,
- Fencing,
- Sealed corridor regulations, and
- Railroad noise and quiet zones.[55]

## III. Effect of Proposed Changes:

The bill implements some, but not all of the OPPAGA rail study recommendations for filling in the regulatory "gaps" identified in the report, along with related provisions. The bill creates the Florida High-Speed Passenger Rail Safety Act, requiring the FDOT to regulate railroad companies within the state to the extent that such authority is not preempted by federal law or regulation. Generally, the bill requires the FDOT to adopt certain minimum standards or criteria for regulation in specified areas and authorizes the FDOT to impose up to a $10,000 administrative penalty for each violation of the required rules. The bill assigns various duties to

[53] The complete study is available at: http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/18-RAILrpt.pdf (last visited January 17, 2020)
[54] *Id* at pp. x-xi
[55] *Id.* at p. 78.

railroad companies, the FDOT, and the FDEM related to certain privately owned high-speed passenger rail (HSPR) operations.

**Short Title, Definitions, Legislative Intent, and Applicability (Sections 1-4)**

***Present Situation***

While Florida law does contain definitions relating to a publicly funded passenger rail system and a number of provisions relating to high-speed rail, Florida law currently does not specifically contain a "High-Speed Passenger Rail Safety Act" nor any definitions, Legislative intent, or applicability provisions specific to such an act.

***Effect of Proposed Changes***

**Section 1** of the bill creates s. 341.601, F.S., providing a short title for the act, the "Florida High-Speed Passenger Rail Safety Act," including ss. 341.601 through 341.611, F.S.

**Section 2** of the bill creates s. 341.602, F.S., providing the following definitions as used in the act:

- "Department" means the Department of Transportation;
- "Freight railroad carrier" means any person, railroad corporation, or other legal entity in the business of providing freight rail transportation;
- "Governmental entity" means the state, any of its agencies, or any of its political subdivisions;
- "Hazardous materials" includes all materials, wastes, or substances designated or defined as hazardous by 49 C.F.R. parts 100-199 and their implementing regulations, by 42 U.S.C. s. 9601, or in any state law, rule, or program that regulates handling or transporting of such materials, wastes, or substances;
- "High-speed passenger rail system" (HSPR system) means any intrastate passenger rail system that operates or proposes to operate its passenger trains at a maximum speed in excess of 80 miles per hour.
- "Public railroad-highway grade crossing" means a location at which a railroad track is crossed at grade by a public road.
- "Rail corridor" means a linear, continuous strip of real property that is used for rail service. The term includes the corridor and structures essential to railroad operations, including the land, buildings, improvements, rights-of-way, easements, rail lines, roadbeds, guideway structures, switches, yards, parking facilities, power relays, switching houses, rail stations, any ancillary developments, and any other facilities or equipment used for the purposes of construction, operation, or maintenance of a railroad that provides rail service.
- "Railroad company" means any individual, partnership, association, corporation, or company and its respective lessees, trustees, or court-appointed receivers which develops or provides ground transportation that runs on rails, including, but not limited to, any of the following:
  - A HSPR system;
  - A freight railroad carrier; or
  - A company that owns a rail corridor.
- "Sealed corridor" means a railroad corridor that uses safety measures to block all lanes of travel where a roadway crosses a railroad track and that uses pedestrian treatments at grade crossings and controls between crossings to prevent trespassing.

**Section 3** of the bill creates s. 341.603, F.S., expressing the Legislature's intent to encourage the creation of safe and economical transportation options for this state's residents and visitors, including HSPR systems; and to promote and enhance the safe operation of HSPR systems within the state to protect the health, safety, and welfare of the public.

**Section 4** of the bill creates s. 341.604, F.S., applying the act to any railroad company that operates a HSPR system and any railroad company that allows a HSPR system to operate on or within its rail corridor.

**FDOT Powers, Duties, and Rulemaking (Section 5)**

***Present Situation***

FDOT Authority to Regulate Railroad Companies/Obtain Information/Keep Records: Except for specific areas referred to in state law (such as rail crossings and federally delegated safety inspections), the FDOT's regulatory authority over railroad companies is limited in scope. Under the federal regulatory scheme, state or local attempts to regulate railroad companies, including obligating a railroad to provide information and requiring a railroad to keep records, may or may not be preempted under one or more federal laws.

Whether federal preemption applies is dependent upon the particular regulation, the information sought, and the record-keeping requirement. For example, if the regulation or requirement is already addressed in one or more federal provisions, an analysis under those provisions must be conducted to determine whether preemption, or any exception to preemption, applies. Research reveals numerous examples of litigation involving such questions, with results turning on the specific words of, and sometimes their placement in, any given regulation. To the extent that any state regulation or record-keeping requirement is not preempted, and the FDOT has state-granted legal authority, the FDOT may exercise such authority. The same analysis would apply to any FDOT rule adopted pursuant to the bill's rulemaking requirements.

Railroad-Highway Grade Crossing Responsibility: The FDOT is granted regulatory authority over all public railroad-highway grade crossings in the state, including issuance of permits required to open and close any such crossing.[56] The FDOT is directed, in cooperation with railroads operating in the state, to develop and adopt a program for the expenditure of funds available for the construction of projects to reduce hazards at public railroad-highway grade crossings. Section 335.141(2)(b), F.S., requires every railroad company maintaining a public railroad-highway grade crossing, upon reasonable notice from the FDOT, to install, maintain, and operate at such crossing traffic control devices to provide motorists with warning of the approach of trains. The FDOT's notice must be based on its adopted hazard reduction program and on construction efficiency considerations relating to the geographical proximity of crossings included in the program. The FDOT must approve the design of the traffic control devices, and the costs of purchase and installation must be paid from the funds in the adopted program.

A railroad company must maintain at its own expense any public railroad crossing opened prior to July 1, 1972, unless the maintenance has been provided for through a contractual agreement

[56] Section 335.141, F.S.

entered into prior to October 1, 1982. If the railroad fails to maintain a crossing, the governmental entity with jurisdiction, after notice to the railroad of needed repairs and 30 days after the railroad's receipt of the notice, is required to make the repairs. The repair cost becomes a lien on the railroad and its rolling sock, enforceable by filing suit, and any judgment includes a reasonable attorney's fee.[57]

Pursuant to 23 U.S.C. 130, federal funds are available to states for projects that eliminate rail-highway crossing hazards to both vehicles and pedestrians. State laws requiring railroads to share in the cost of work for the elimination of hazards at rail-highway crossings do not apply to projects using federal funds.[58] The applicable regulation sets out a railroad's required share of costs in such projects and, in many cases, the railroad has no required share. If a project is not funded through the federal hazard reduction program, it appears state laws requiring a railroad's participation in the cost of rail-highway grade crossing improvements may be permissible, in the absence of any applicable contractual agreement otherwise providing for such costs.

Chapter 351, F.S., contains additional relevant provisions:

- Every railroad company is responsible for erecting and maintaining crossbuck warning signs at all public or private crossings in accordance with the Manual on Uniform Traffic Control Devices (MUTCD).[59, 60]
- The governmental entity with jurisdiction or maintenance responsibility must install and maintain advance railroad warning signs and pavement markings at public crossings in accordance with the MUTCD.[61]

Prior to the work on the grade or the highway approaches at a public railroad-highway crossing, the railroad or the governmental entity initiating the work must notify the other party to promote coordination and ensure a safe crossing with smooth pavement transitions from the grade of the railroad to the highway approaches.[62]

Remote Health Monitoring (RHM): RHM systems provide a variety of uses and are designed to monitor various functions of railroad operations. They generate data related to fuel consumption; engineer compliance with train operation protocols; train speeds, locations, and direction; control system fault detection; and more. These systems can be customized to fit specific requirements.[63] In its diagnostic safety review of the FECR grade crossings for the All Aboard Florida project in Brevard and Indian River Counties, the FRA recommended that "four-quadrant gate systems

[57] Section 335.141(2)(c), F.S.
[58] 23 C.F.R. 646.210.
[59] Section 351.03(1), F.S.
[60] The MUTCD is the national standard for all traffic control devices installed on any street, highway, bikeway, or private road open to travel and is intended to obtain basic uniformity of traffic control devices. The FDOT has adopted the MUTCD as directed by s. 316.0745, F.S. Per guidance in the manual, "The appropriate traffic control system to be used at a highway-rail grade crossing should be determined by an engineering study involving both the highway agency and the railroad company." *See* the MUTCD introduction, p. 748, available at: https://mutcd.fhwa.dot.gov/pdfs/2009r1r2/part8.pdf (last visited January 17, 2020.
[61] Section 351.03(2), F.S.
[62] Section 351.141(2)(d), F.S.
[63] *See* article *Multi-Purpose Monitoring Technology*, October 6, 2014, available at: http://www.railwayage.com/index.php/communications/multi-purpose-monitoring-technology.html (last visited January 17, 2020).

*should* include remote health (status) monitoring capable of automatically notifying railroad or signal maintenance personnel when anomalies have occurred within the system."[64] The MUTCD similarly provides that four-quadrant gate systems *should* include RHM but it does not *mandate* RHM inclusion.[65]

Traffic Signal Preemption Systems: The MUTCD, among other relevant provisions, contains an entire Part 8 dedicated to traffic control for railroad and light rail transit grade crossings, including numerous provisions relating to traffic signal preemption, along with supporting references to industry publications.

Sealed Corridors: According to the FRA, it has "advocated for a minimum of active warning systems with gates, controlled by constant warning time circuitry, on rail lines with speeds of 80 mph and greater," but new developments have pointed to additional strategies. "The State of North Carolina has pioneered many of the subsequent advances on the North Carolina Railroad under the concept of a 'sealed corridor." According to the FRA, sealed corridor treatment provides an additional layer of safety by blocking all lanes of travel, preventing left turns from parallel roadways that inadvertently result in driving around the tip of the gate arm, and by discouraging those who might attempt to go around the lowered gate. Blocking travel lanes can be accomplished by using one or more of the following:

- Four-quadrant gates,
- Median arrangements, and
- Paired one-way streets with gate arms extending across all lanes of travel.[66]

These improvements "can be paired with selective use of barrier gates at particularly troublesome crossings." Further, "It should be noted that sealed corridor treatments are also appropriate at crossings with more than two tracks, regardless of speed, and particularly near passenger stations. Additional warning time will be required at these locations to ensure that all road traffic clears the crossing. Pedestrian gates and effective channelization should be provided."[67]

Crossing Gate Installation Maintenance of Roadbed/Track/Culverts/Streets/Sidewalks: Cities and counties along Florida's east coast reportedly have existing crossing agreements with Florida East Coast Railway. Under those agreements, the local governments usually have financial responsibility for crossing signal installations, capital improvements for track beds and roadway surfaces, crossing maintenance costs, and pedestrian gates and sidewalks.***[68]***

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[64] *See* the FRA *On-Site Engineering Field Report – Part 2*. (on file in the Senate Infrastructure and Security Committee.)
[65] *See* the MUTCD, Part 8, s. 8C.06, available at: https://mutcd.fhwa.dot.gov/pdfs/2009r1r2/part8.pdf (last visited January 17, 2020).
[66] *See* the FRA *Highway-Rail Grade Crossing Guidelines for High-Speed Passenger Rail*, Version 1.0, November 2009 pp. 8-9, available at: https://cms8.fra.dot.gov/elibrary/highway-rail-grade-crossing-guidelines-high-speed-passenger-rail (last visited January 20, 2020).
[67] *Id.* As noted in the preface, the FRA Guidelines are *not* regulations and do not establish a standard of care; *i.e.*, compliance with the guidelines is *not* required. For more information on North Carolina's sealed corridor program, *see* the North Carolina Department of Transportation website available at https://www.ncdot.gov/divisions/rail/projects/Pages/sealed-corridor-program.aspx (last visited January 17, 2020).
[68] *Supra* note 48.

Fencing Requirements: Research reveals that while the federal government has studied the use of fencing to restrict access to railroad right-of-way by pedestrians, federal law apparently does not require railroads to install such fencing. A 2014 U.S.D.O.T. technical report expresses the view that fencing along an entire railroad right-of-way would not be reasonable due to the size of the U.S. rail system and necessary access points. The report notes that targeting high-risk areas for fencing may be possible and acknowledges an ongoing debate as to the effectiveness of fencing as a method for increasing rail safety.[69]

Other state jurisdictions do have laws relating to fencing of railroad right-of-way and making railroads liable for damages resulting from the failure to do so. For example, Minnesota requires every railroad company to build and maintain fences on each side of all lines of its railroad, with certain exceptions.[70] New York requires every railroad to erect and maintain a fence along the boundary line of its right-of-way if, after a hearing, a determination is made that fencing is necessary. The New York transportation commissioner is authorized to prescribe by order the height, length, materials and design of the fencing.[71] Research reveals no challenge to these state requirements.

***Effect of Proposed Changes***

**Section 5** of the bill creates s. 341.605, F.S., providing the FDOT shall, *to the extent that such authority is not preempted by federal law or regulation*:

- Regulate railroad companies in this state;
- Obtain from any party all information necessary to enable it to perform its duties and carry out the act's requirements;
- Keep a record of all its findings, decisions, and determinations made, and investigations conducted, under the act; and
- By January 1, 2021, adopt rules to administer the act, which rules must include minimum standards or criteria for:
    - Public railroad-highway grade crossing design, including, but not limited to, installation of appropriate safety equipment, such as remote health monitoring and traffic signal preemption systems;
    - Implementation of sealed corridors and of safety measures to be used at sealed corridors;
    - Installation or realignment of crossing gates at severely skewed, acute-angled grade crossings along the rail corridor; and
    - Field surveys of the rail corridor to be conducted for the purpose of identifying areas where fencing is necessary to protect the health, safety, and welfare of the public, including, but not limited to, minimum requirements for construction and materials.

Railroad-Highway Grade Crossing Responsibility: The rulemaking requirements address the regulatory "gaps" identified in the OPPAGA report and recommended as considerations for the FDOT to consider under authority the department does or could have; *i.e.*, setting minimum grade crossing design standards, setting requirements for fencing along railroad corridors, and

[69] *See* the report, *Countermeasure to Mitigate Intentional Deaths on Railroad Rights-of-Way; Lessons Learned and Next Steps*, available at: https://cms8.fra.dot.gov/elibrary/countermeasures-mitigate-intentional-deaths-railroad-rights-way-lessons-learned-and-next (last visited January 17, 2020).
[70] Section 219.31, Minnesota Statutes.
[71] RRD, Article 3, s. 52-B, Laws of New York.

creating guidelines for sealed corridor treatment along railroad corridors.[72] FDOT rules setting minimum standards as required in the bill generally appear to be valid and enforceable under its existing statutory responsibility.

Remote Health Monitoring: While the FRA has recommended RHM for grade crossings that will have four-quadrant gates in Brevard and Indian River Counties, research reveals no federal *requirement* for such monitoring systems as part of warning systems at grade crossings. On the one hand, preemption may not apply under the theory that federal law and regulations have not "covered the subject matter," thus, allowing a state to enact such a requirement. Additionally, the effect may also turn on whether such installation is funded through the federal hazard reduction program. If not, an FDOT rule containing minimum criteria for installation of RHM may be valid for HSPR systems that are not already covered by a contractual agreement that imposes responsibility for such costs.

Traffic Signal Preemption Systems: As the MUTCD already addresses minimum standards for preemption of traffic signals near railroad crossings and is already incorporated into Florida law under s. 316.0745, F.S.,[73] whether the FDOT would need to adopt additional standards is unclear.

Sealed Corridors: While the FRA has published guidelines relating to sealed corridor treatments, it has not mandated any such requirements and points to the State of North Carolina as an example of best practices. An FDOT rule including minimum standards for sealed corridor implementation as required in the bill is apparently not preempted by federal law or regulation.

Crossing Gate Installation/Realignment: To the extent that existing contractual agreements place financial responsibility for crossing signal installations, capital improvements for track beds and roadway surfaces, crossing maintenance costs, and pedestrian gates and sidewalks on cities and counties (and to the extent that no such work is a part of the FDOT's federally-funded grade crossing hazard reduction program), the bill likely has no effect. Those existing contracts remain in place and are not impaired.

To the extent that no agreements are in place covering a HSPR system, the bill may make railroad companies responsible for these costs (unless funded by the federal hazard reduction program, which provides in many cases that railroads do not share in costs).

Fencing Requirements: To the extent that existing contractual agreements do not address costs related to fencing requirements, and given that other states have imposed fencing requirements without challenge, an FDOT rule containing minimum standards for fencing to protect the public health, safety, and welfare, may survive a challenge on grounds of preemption.

[72] *Id.* at pp. x-xi (Groups 2. and 3.) and p. 78.
[73] *Supra* note 60.

**Hazardous Materials Training (Section 6)**

***Present Situation***

Hazardous material employers are required to train their hazardous material employees and to keep certain records related to that training.[74] Federal law allows training to be provided by the hazardous material employer or by other public or private sources.[75] Computer-based training programs are also available.[76] Florida law charges the Florida Division of Emergency Management (FDEM) with coordinating federal, state, and local emergency management activities to ensure the availability of adequately trained and equipped forces of emergency management personnel before, during, and after emergencies and disasters. Additionally, the FDEM is responsible for implementing training programs to improve the ability of state and local emergency management personnel to prepare and implement emergency management plans and programs.[77]

***Effect of Proposed Changes***

**Section 6** of the bill creates s. 341.606, F.S., requiring the FDEM, if a HSPR system operates on a rail corridor or on a set of tracks which is also used to transport hazardous materials, to offer the local communities and local agencies located along the corridor training specifically designed to help them respond to an accident involving rail passengers or hazardous materials.

A review of the FDEM's website suggests that similar training may already be available.[78]

**Reporting Requirements (Section 7)**

***Present Situation***

Florida law does not currently address railroad company reporting requirements related to accident reports, liquefied natural gas (LNG) shipments, or worst-case LNG release impacts.

Accident Reports: With certain exceptions, each railroad is required to submit to the FRA a monthly report of all railroad accidents or incidents that are:

- Highway-rail grade crossing accidents;
- Rail equipment accidents (collisions, derailments, fires, explosions, acts of God, and other events involving the operation of on-track equipment resulting in specified damages); and
- Death, injury, or occupational illness.[79]

Federal regulations prescribe the forms to be used, which must be completed in accordance with the current FRA Guide and submitted within 30 days after expiration of the month during which

[74] *See* 49 C.F.R. 172, Subpart H.
[75] *See* 49 C.F.R. 172.702. *See also* 49 C.F.R. 172.704 for specific training requirements.
[76] *See* the U.S.D.O.T. website available at: https://www.phmsa.dot.gov/training/hazmat/training-modules. (last visited January 17, 2020).
[77] Section 252.35(2)(l) and (n), F.S.
[78] *See* the FDEM's website available at: https://floridadisaster.org/dem/about-the-division/ and https://floridadisaster.org/dem/preparedness/training-and-exercise/ (last visited January 17, 2020).
[79] 49 C.F.R. 225.11 and 225.19.

the accidents occur.[80] The FRA Office of Safety Analysis makes available railroad safety information, including accidents and incidents, inventory, and highway-rail crossing data, on a website that allows queries for accident, casualty, and crossing accident data by state.[81] Federal regulation authorizes any state to require railroads, for occurrences within that state, to submit to the state copies of accident/incident and injury/illness reports filed with the FRA.[82]

LNG Shipment by Rail: LNG is classified as a hazardous material.[83] Current federal regulations prohibit transportation of bulk packaging (e.g., portable tanks, intermediate bulk containers, large packaging, cargo tanks, multi-unit tank car tanks) containing a hazardous material in container-on-flatcar (COFC) or trailer-on-flatcar (TOFC) service except as authorized by 49 C.F.R. 174.63[84] or unless approved for transportation by the FRA Associate Administrator for Safety. The FECR reportedly "has already received approval, and has begun transporting LNG between Port Miami and Port Everglades in Fort Lauderdale."[85]

Worst-Case Release Calculation: The State of Washington reportedly looked to federal rule making by the Pipeline and Hazardous Materials Safety Administration and the FRA, and to the tank-car derailment and leakage of some 1.6 million gallons of oil in Lac-Megantic, Quebec, in arriving at its regulations with respect to an unplanned crude oil release.[86] Among other information, the regulations require extensive insurance and financial information sufficient to demonstrate the railroad company's ability to pay the costs to clean up a reasonable worst-case spill of oil. Research reveals no legal challenge to the Washington regulation. It is therefore unknown whether the regulation would withstand a challenge on grounds it is preempted by federal law. With respect to onshore oil pipelines, 49 C.F.R part 194 requires such pipeline operators to submit a response plan. Each operator is required to determine the worst-case discharge, providing the methodology and calculations used to arrive at the discharge volume.

### *Effect of Proposed Changes*

**Section 7** of the bill creates s. 341.607, F.S., requiring the following:

- A railroad company operating a HSPR system must provide to the FDOT copies of accident reports filed with the FRA for each train accident that occurs within the rail corridor;

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[80] 49 C.F.R. 225.11.
[81] *See* the FRA website available at: http://safetydata.fra.dot.gov/OfficeofSafety/default.aspx (lLast visited January 17, 2020).
[82] 49 C.F.R. 225.1.
[83] *See* the Table Of Hazardous Materials, 49 C.F.R. 172.101 available at: https://www.govinfo.gov/content/pkg/CFR-2019-title49-vol2/pdf/CFR-2019-title49-vol2-part172.pdf (last visited January 17, 2020). .
[84] This section of the federal regulations lays out very specific conditions under which bulk-packaged hazardous materials may be transported on the specified cars, based on factors such as the type of transport vehicle, restraint system, container support system, and load configuration. However, the Pipeline and Hazardous Materials Safety Administration issued a notice in October of 2019 proposing changes to the regulations to authorize bulk transport of LNG in certain rail tank cars. *See* the Federal Register, Vol. 84, No. 206, p. 56964, October 24, 2019, available at http://www.puntofocal.gov.ar/notific_otros_miembros/usa1544_t.pdf (last visited January 17, 2020).
[85] *See* article available at: http://www.tcpalm.com/story/news/local/shaping-our-future/all-aboard-florida/2017/10/24/lng-brightline-all-aboard-florida-east-coast-railway-tracks-hazmat-ferromex-grupo-mexico-fortress/791510001/ (last visited January 17, 2020).
[86] *See* article, *Washington Asks if Railroads Could Afford $700M Oil Train Spill*, available at: http://www.bellinghamherald.com/news/local/article60156446.html (last visited January 17, 2020).

- The FDOT must annually publish on its website a compendium of the reports that include any fatalities, injuries, and accidents occurring within the reporting timeframe which have occurred within a rail corridor where a HSPR system operates; and
- A railroad company that transports LNG on the same tracks or within the same rail corridor used by a HSPR system must annually submit a report to the FDOT containing the size of the average and largest LNG train, as measured in metric tons, operated in the state by the railroad company in the previous calendar year.

This section of the bill also requires the FDOT, in coordination with the FRA and other public and private entities, as necessary, to adopt by rule criteria to determine a reasonable worst-case unplanned release of LNG.

Additionally, the bill provides that the reporting requirements are for informational purposes only and may not be used to economically regulate the railroad company.

Accident Reports: Requiring a railroad company to furnish to the FDOT copies of accident reports filed with the FRA for each accident occurring within this state is authorized by federal law.[87] Whether it is permissible under federal law to require the FDOT to take the additional step of *preparing* a compendium of the reports on fatalities, injuries, and accidents during the specified reporting period for publication on the FDOT's website, in addition to simply publishing the FRA-required accident/incident reports on the FDOT website, is unclear.[88]

LNG Annual Disclosure: Whether the bill's provisions that the reporting requirements are for information purposes only and may not be used to economically regulate the railroad company would enable it to withstand a challenge based on preemption is likewise unclear given the absence of any challenge to the Washington statute, which requires extensive financial and insurance information in addition to the more limited disclosure of the size of the average and largest LNG train operated in the previous year, as required by the bill. However, the bill imposes no penalty against a railroad company, even if, for example, a railroad company made no report at all.[89]

**Minimum Safety Standards for HSPR Systems (Section 8)**

***Present Situation***

Compliance with Federal Law and Regulation: Railroad companies are currently required to comply with any applicable federal law or regulation.

[87] *Supra* note 84.

[88] If these reports contain confidential commercial information as defined under federal law (trade secrets and confidential, privileged, and/or proprietary business or financial information submitted to the [U.S. Department of Transportation] by any person), a Freedom of Information Act request to the FRA may be required. *See* the FDOT 2020 Legislative Bill Analysis for SB 676 available at http://abar.laspbs.state.fl.us/ABAR/ABAR.aspx (last visited January 17, 2020). The FDOT may be unable to comply with the bill's requirement in such cases.

[89] Under the bill, the authorized administrative penalty applies only to violations of the rules adopted under the new s. 341.605, F.S. The bill creates no penalty with respect to the required LNG annual report.

***Effect of Proposed Changes***

**Section 8** of the bill creates s. 341.608, F.S., titled "Minimum safety standards for high-speed passenger rail systems."

Compliance with Federal Law and Regulation: This section of the bill requires a railroad company operating a HSPR system to comply with federal law and FRA regulations, mirroring current federal law, and additionally requires compliance with the rules adopted by the FDOT pursuant to the bill's direction.

**Section 9** of the bill creates s. 341.609, F.S., to impose the following requirements on a railroad company that constructs or operates a HSPR system:

- If the railroad company is required to install safety improvements that modify the width of a roadbed, the railroad is responsible for ensuring the impacted roadbed meets the FDOT's transition requirements as set forth in the most recent edition of the FDOT's Design Standards and the Manual of Uniform Minimum Standards for Design, Construction, and Maintenance for Streets and Highways.[90]

The bill provides that this newly created s. 341.609, F.S., as is the case under current law, may not be construed to impair any existing contractual agreements between the railroad company operating the HSPR system and a governmental entity within the state.

**Safety Inspections and Inspectors (Section 10)**

***Present Situation***

Section 341.302(8), F.S., authorizes the FDOT to conduct inspections of track and rolling stock, train signals and related equipment, hazardous materials transportation, and train operating practices.

The federal State Rail Safety Participation program uses state safety inspectors in rail safety inspection disciplines. The program emphasizes routine compliance inspections but authorizes states to undertake additional investigative and surveillance activities under certain circumstances. Each state agency is required to enter into an agreement with the FRA that delegates to the state investigative and surveillance authority for federal railroad safety laws. The program includes federal funding to reimburse states for costs of related rail safety inspector technical training.[91]

[90] The purpose of the manual, adopted by the FDOT as directed in s. 336.045, F.S., "is to provide uniform minimum standards and criteria for the design, construction, and maintenance of public streets, roads, highways, bridges, sidewalks, curbs and curb ramps, cross walks, bicycle facilities, underpasses, and overpasses used by the public for vehicular and pedestrian traffic." *See* the FDOT's website available at: http://www.fdot.gov/roadway/FloridaGreenbook/FGB.shtm (last visited January 17, 2020).

[91] *See* the FRA website available at: https://railroads.dot.gov/divisions/partnerships-programs/state-rail-safety-participation (last visited January 17, 2020). *See* also 49 C.F.R. part 212.

The FDOT has a long-standing agreement with the FRA for participation in the federal program, which is periodically renewed. The agreement lists the FDOT's five certified railroad safety inspectors and their areas of responsibility. The agreement calls for the FRA and the FDOT certified inspectors to singly and jointly conduct investigative, surveillance, and enforcement activities within Florida under the FRSA and sets out the following safety areas or disciplines for surveillance: track, motive power and equipment, signals and train control, operations, and hazardous materials. These inspectors must be capable of composing narrative reports and recording data on standard report forms for submission to the FRA.

***Effect of Proposed Changes***

**Section 10** of the bill creates s. 341.6101, F.S., requiring the FDOT's railroad inspectors to be certified by the FRA in accordance with the State Rail Safety Participation Program. The inspectors must coordinate their activities with those of federal rail inspectors in compliance with 49 C.F.R. part 212 and any other federal regulations governing state safety participation. Unless otherwise confidential under state or federal law, the FDOT inspectors must report in writing the results of their inspections in the manner and on forms prescribed by the FDOT. The reports must be made available on the FDOT's website for the public to access.

Research reveals no provisions of federal or state law that expressly address the confidentiality of rail inspection reports. Under Florida law, these reports appear to fall within the definition in s. 119.07(12), F.S., of "public records."[92] Such reports may be available from the FRA if requested under the Freedom of Information Act (FOIA).[93] The FOIA expressly exempts, for example, trade secrets and commercial or financial information from its application.[94]

The FDOT appears to be in compliance with the requirements of this section of the bill, except that it currently does not publish the reports on its website.[95] To the extent that federal law prescribes the forms that the FDOT's inspectors must use in completing their inspection reports, any FDOT rule relating to forms may be preempted. Whether publication of the reports on the FDOT's website is permissible under federal law is unclear. See discussion above under the heading, "Accident Reports."

**Severability and Effective Date (Sections 11 - 13)**

**Section 11** creates s. 341.611, F.S., providing for severability of invalid provisions or applications of the act.

**Section 12** recites that sections 341.601-341.611 are remedial in nature and apply retroactively.

**Section 13** of the bill provides the act take effect on July 1, 2020.

[92] "All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."
[93] 5 U.S.C. 552.
[94] *Id.*
[95] *See* the FDOT's email to committee staff, January 21, 2020 (on file in the Senate Infrastructure and Security Committee.)

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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 fiscal impact to railroads is largely indeterminate, depending on whether given provisions in the bill are federally preempted, or whether existing contractual agreements covering cost allocation apply. Railroads may incur costs associated with the following:

- Compliance with the FDOT rules and potential associated penalties for violations (section 5);
- Reporting requirements (section 7); and
- Railroad-highway grade crossing responsibilities (section 9).

Railroads may experience increased litigation costs related to preemption, regulatory compliance, and impairment of contract issues.

C. Government Sector Impact:

To the extent that sections 5 and 9 allow a local government to avoid future costs that would be incurred for railroad-highway grade crossing construction, maintenance and repairs, the local government would have an indeterminate positive fiscal impact.

An indeterminate negative fiscal impact to the FDOT is expected for expenses associated with:

- Adopting and enforcing rules (sections 5 and 7), and
- Publishing accident and inspection reports (sections 7 and 10).

And indeterminate positive fiscal impact may be realized if violations of the required rules occur and the FDOT imposes the authorized administrative penalties. An indeterminate negative fiscal impact to the FDEM is expected for expenses associated with providing the required hazardous material training (section 6).

To the extent that there is litigation involving any of the regulatory provisions of this bill, governmental entities may experience increased litigation costs.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 341.601, 341.602, 341.603, 341.604, 341.605, 341.606, 341.607, 341.608, 341.609, 341.6101, and 341.611, 341.61CS 2.

## IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Infrastructure and Security on January 21, 2020:**
The CS substantially revises the original bill as follows:

- Requires the FDOT to adopt minimum standards for public railroad-highway grade crossing design and installation of safety equipment, use of sealed corridors at such crossings, and field surveys for determining areas where fencing is necessary to protect the public, to the extent not prohibited by federal law;
- Authorizes the FDOT to impose against a railroad company an administrative penalty of up to $10,000 for each violation of the FDOT rules, eliminating reference to enforcement under s. 316.640, F.S., relating to enforcement of the state's traffic laws;
- Eliminates the requirement that railroad companies provide detailed financial information related to ability to respond to a worst-case unplanned release of LNG, leaving only an annual report to the FDOT regarding LNG shipments in the previous calendar year; and
- Narrows the conditions under which a railroad company is assigned responsibility for certain maintenance, repair, or upgrade costs in the absence of a contractual agreement covering such costs

B. Amendments:

None.