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 Transportation

BILL:	CS/SB 386
INTRODUCER:	Transportation Committee and Senator Mayfield and others
SUBJECT:	High-speed Passenger Rail
DATE:	March 15, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Price	Miller	TR	**Fav/CS**
2.			CA	
3.			AP	

I. Summary:

CS/SB 386 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; assigns various duties to the Florida Department of Transportation (FDOT); and imposes certain reporting requirements on railroad companies and the FDOT. The bill specifies that the reporting requirements are for informational purposes only and may not be used to economically regulate a railroad company.

The bill also requires railroad companies to install certain technology and equipment; allocates responsibility for certain maintenance, repair, improvement and upgrade costs to railroad companies; and provides that with respect to its requirements related to maintenance and repair of railroad-highway crossings it does not impair existing contracts. The bill authorizes the FDOT to bring actions for assessment and collection of civil penalties or for injunctive relief pursuant to certain federal law. The bill also provides for enforcement jurisdiction and requires any penalty for a violation of the bill's provisions to be imposed upon the railroad company that commits such violation.

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. 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]

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

[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).

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]

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.

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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 February 17, 2017).

[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.

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. The FRA's primary emphasis is on the transportation or shipment of hazardous material by rail.[18]

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;[19]
- 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; [20]
- 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;
  - 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

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[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] *See* the Pipeline and Hazardous Materials Safety Administration's overview available at: http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Hazmat%20Law%20Overview.pdf. (Last visited March 10, 2017.)

[19] Labeled the "dual compliance" test. *See Index to Preemption of State and Local Laws and Regulations Under the Federal Hazardous Material Transportation Law*, available on the federal Pipeline and Hazardous Materials Safety Administration website at: http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Preemption_Index_January_2014_February_2017.pdf. (Last visited March 8, 2017.)

[20] Labeled the "obstacle" test. *Id.*

- 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.[21]

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. Department of Transportation 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.[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 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

[21] Labeled the "substantively the same as" test. *Supra* note 19.
[22] 49 U.S.C. 5125.
[23] Section 341.302, F.S.
[24] Section 341.302(3), F.S.
[25] *Id*.
[26] Section 341.302(2), F.S.
[27] *See* Tri-Rail, *Destinations*, http://www.tri-rail.com/destinations/ (last visited February 14, 2017).

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 recently began its southern expansion into Osceola County, with construction underway to link Sand Lake Road to Poinciana in Osceola County. The project is a 17.2-mile segment featuring four additional stations expected to be up and running by early 2018.[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, the high-speed rail constitutional amendment was repealed.

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 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

[28] *See* the SunRail website available at: http://corporate.sunrail.com/stations-trains/phase-1-stations/ (last visited February 14, 2017).
[29] *See* the SunRail website available at: http://corporate.sunrail.com/stations-trains/phase-2-south-stations/ (last visited February 14, 2017).
[30] *See* the SunRail website available at: http://corporate.sunrail.com/stations-trains/phase-2-north-stations/ (last visited February 14, 2017.
[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.
[34] *See* s. 20.23(4)(a), F.S.
[35] Section 341.822, F.S.
[36] Chapter 2014-223, L.O.F.

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 acquired FECI.[39] All Aboard Florida (AAF) is a wholly owned subsidiary of FECI.[40]

AAF is currently developing an 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. Improving the route between Miami and Cocoa, building out the route between Cocoa and Orlando, and constructing train stations in Miami, Fort Lauderdale, and West Palm Beach is to occur in the meantime. Station construction projects are at various stages.[41]

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.[42] New signal systems, upgraded crossings, double tracking and other improvements for the existing rail corridor between Cocoa and Miami are included in the construction plans.[43]

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.[44] AAF reportedly wishes to be named a third-party beneficiary in those agreements already in place.[45]

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[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: http://www.fecrwy.com/about/history. (Last visited March 8, 2017.)

[39] *See* article *Fortress Buying Florida's Flagler Development in $3.5B Deal, available at:* http://www.costar.com/News/Article/Fortress-Buying-Floridas-Flagler-Development-in-$35B-Deal/89781. (Last visited March 8, 2017.)

[40] *See* the AAF website available at: http://www.allaboardflorida.com/. (Last visited March 8, 2017.)

[41] *Id.*

[42] *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 March 12, 2017.)

[43] *Supra* note 40.

[44] *See* Martin County document, *Direct Costs to Treasure Coast from High-Speed Rail* (On file in the Senate Transportation Committee).

[45] *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

III. Effect of Proposed Changes:

The bill creates the Florida High-Speed Passenger Rail Safety Act, assigning various duties to the FDOT related to certain privately owned HSPR operations. The bill imposes certain reporting requirements on railroad companies, requires installation of certain technology and equipment, and allocates costs and responsibility for certain rail corridor improvements and upgrades. The bill provides for enforcement jurisdiction and authorizes the FDOT to bring actions for assessment and collection of penalties or for injunctive relief pursuant to federal law.

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 341.615, 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 Florida 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;
- "High-speed passenger rail system" (HSPR system) means any new intrastate passenger rail system that operates or proposes to operate its passenger trains at a maximum speed in excess of 80 miles per hour on or after July 1, 2017.
- "Pedestrian grade crossing" means a separate sidewalk or pathway where pedestrians, but not vehicles, cross railroad tracks.
- "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, 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.

visited February 27, 2017.) *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 February 27, 2017.)

- "Railroad company" means any individual, partnership, association, corporation, or company and its respective lessees, or court-appointed trustees or receivers, that 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.

Section 3 of the bill creates s. 341.603, F.S., expressing the Legislature's intent to encourage the creation of safe and cost-effective transportation options for this state's residents and visitors, including HSPR systems; and to promote and enhance the safety of HSPR systems operating 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 operating a HSPR system, or 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 state to keep records, may or may not be preempted under one or more federal laws.

Hazardous Material Training: Hazardous material employers are required to train their hazardous material employees and to keep certain records related to that training.[46] Research reveals that federal law allows company employees, outside training firms, federal and state agencies, colleges and universities, and any other organization that can meet the objectives of the training requirements to provide hazardous material training. Computer-based training programs are also available.[47] Florida law does not currently require the FDOT to offer hazardous material or emergency response training related to rail operations. However, the Florida Division of Emergency Management (FDEM) is charged 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.[48]

Effect of Proposed Changes

Section 5 of the bill creates s. 341.605, F.S., providing the FDOT may:

[46] *See* 49 C.F.R. 172, Subpart H (10-1-2016).
[47] *See* the U.S.D.O.T. presentation, p. 23, available at: http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/FRA_Rail_HAZMAT.pdf. (Last visited March 9, 2017.)
[48] Section 252.35(2)(l) and (n), F.S.

- Regulate railroad companies in this state insofar as such authority is not preempted by federal laws or regulations; and
- Obtain from any party all information necessary to enable it to perform its duties and carry out the act's requirements.

In addition, the bill requires the FDOT to:
- Keep a record of all its findings, decisions, determinations, and investigations carried out under the act;
- Offer, in coordination with the FDEM, local communities and local emergency services located along the rail corridor training specifically designed to help them respond to an accident involving rail passengers or hazardous materials, if a HSPR system operates within the same rail corridor or on the same set of tracks as another railroad company that transports hazardous materials.
- Adopt rules to administer the new statutory section.

Whether federal preemption applies to these provisions 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 authority.

The FDOT advises it does not currently have employees who would be qualified to provide the bill's required hazardous material training.[49] A review of the FDEM's website suggests that similar training may already be available.

Reporting Requirements

Present Situation

Florida law does not currently address railroad company reporting requirements related to accident reports, liquefied natural gas (LNG) shipments, insurance and financial disclosure, 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.[50]

[49] *See* the email from FDOT staff dated February 24, 2017. (On file in the Senate Transportation Committee.)
[50] 49 C.F.R. 225.11 and 225.19 (10-1-2016).

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 the accidents occur.[51] 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.[52] Federal law 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.[53]

LNG Shipment by Rail: LNG is classified as a hazardous material.[54] Research reveals little federal guidance on LNG rail shipments and suggests that LNG rail shipments currently require approval from the FRA on a case-by-case basis.[55] Alaska has received such approval.[56] The FEC reportedly has an application pending before the FRA to transport LNG by rail in South Florida.[57]

Insurance and Financial Disclosure: The State of Washington imposes financial disclosure requirements on any railroad company that transports crude oil.[58] Washington requires any railroad company that transports crude oil in Washington to submit an annual statement containing:

- All insurance that covers losses resulting from a reasonable worst-case spill;
- Coverage amounts, limitations, and other conditions of the insurance;
- Average and largest crude oil train operated in Washington by the railroad company in the previous calendar year;
- Information sufficient to demonstrate the railroad company's ability to pay the costs to clean up a reasonable worst-case spill of oil, including insurance, reserve accounts, letters of credit, or other financial instruments or resources on which the company can rely.
- The railroad's calculation of the total cleanup costs for a reasonable worst-case spill based on a statutory formula involving cleanup cost per barrel, crude oil volumes carried, and operating speed.[59]

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[51] 49 C.F.R. 225.11 (10-1-2016).
[52] *See* the FRA website available at: http://safetydata.fra.dot.gov/OfficeofSafety/default.aspx. (Last visited March 9, 2017.)
[53] 49 C.F.R. 225.1.
[54] *See* the Table Of Hazardous Materials, 49 C.F.R. 172.101 (10-1-16) available at: https://www.gpo.gov/fdsys/pkg/CFR-2016-title49-vol2/pdf/CFR-2016-title49-vol2-sec172-101.pdf.
[55] *See* the Pipeline and Hazardous Materials Safety Administration's presentation, *LNG Rail Transportation Initiatives*, April 16, 2015, page 3, available at: http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/LNG_Transportation_Initiatives_Leonard_Majors.pdf. (Last visited March 9, 2017.)
[56] *See* https://www.alaskarailroad.com/sites/default/files/communications/2016_LNG_Transport_Demo_Project.pdf. (Last visited March 9, 2017.)
[57] *See* article *Mayo: Still Awaiting Word (And More Info) on Rail Shipments of Liquefied Natural Gas*, June 8, 2016, available at: http://www.sun-sentinel.com/news/fl-rail-liquid-gas-mayocol-b060916-20160608-column.html. (Last visited March 9, 2017).
[58] W.A.C. 480-62-300 (2016) available at: http://apps.leg.wa.gov/WAC/default.aspx?cite=480-62-300. (Last visited March 9, 2017.)
[59] Alaska also has financial disclosure requirements relating to claims resulting from an oil discharge that apply to oil terminals, pipelines, offshore facilities, exploration or production facilities, refineries, tank vessels, oil barges, and railroad tank cars, but not expressly to "railroads" or "railroad companies." *See* the State of Alaska website available at: https://dec.alaska.gov/spar/ppr/fr.htm. (Last visited March 9, 2017.) Additionally, the State of California in 2014 passed

Research reveals no legal challenge to the Washington law. It is therefore unknown whether the statute would withstand a challenge on grounds it is preempted by federal law.

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.[60] 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.

Research suggests the Pipeline and Hazardous Materials Safety Administration is moving toward development of specific LNG rail transportation regulations, including development of an "LNG rail transportation risk assessment/profile."[61]

Effect of Proposed Changes

Section 6 of the bill creates s. 341.606, F.S., requiring the following:

- The FDOT must annually publish on its official website a report disclosing all fatalities, injuries, and accidents occurring within the reporting period and within a rail corridor where a HSPR system operates.
- 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.
- A railroad company that transports LNG on the same tracks or within the same rail corridor as a HSPR system must annually submit a report to the FDOT containing:
  - All insurance carried by the railroad company that covers any losses resulting from a reasonable worst-case unplanned release of LNG;
  - Coverage amounts, limitations, and other conditions of the insurance.
  - The average and largest LNG train, as measured in metric tons, operated in the state by the railroad company in the previous calendar year.
  - Information sufficient to demonstrate the railroad company's ability to pay the costs of remediating a reasonable worst-case unplanned release of LNG, including but not limited to insurance, reserve accounts, letters of credit, or other financial instruments or resources on which the company can rely to pay all such costs.

This section of the bill also requires the FDOT, in coordination with the FRA and other public and private entities as necessary, to develop rules for determining applicable criteria for a reasonable worst-case unplanned release of LNG.

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regulations for the transportation of oil on or near the waters of the state requiring owners or operators of facilities where an oil spill could impact waters to apply for and obtain a certificate of financial responsibility issued by the State. However, a complaint filed collectively by certain railroad companies for injunctive and declaratory relief was dismissed on ripeness grounds, and the court never reached the question of preemption. The case may be distinguishable on other grounds, however.

[60] *See* article, *Washington Asks if Railroads Could Afford $700M Oil Train Spill*, available at: http://www.bellinghamherald.com/news/local/article60156446.html. (Last visited March 13, 2017.)

[61] *Supra* note 54 at p. 5.

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.[62] Whether it is permissible under federal law to require the FDOT to take the additional step of *preparing* a report on fatalities, injuries, and accidents during the specified reporting period for publication on the FDOT's website, especially if such report is intended to be in addition to simply publishing the FRA-required accident/incident reports on the FDOT website, is unclear.

Insurance and Financial 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. However, the bill appears to impose no monetary fine and no preclearance requirement; that is, no prohibition against a railroad company's continued operation if, for example, a railroad reported that it had no ability to pay the costs of remediating a reasonable worst-case unplanned release of LNG, or even if a railroad made no report at all.

Minimum Safety Standards for HSPR (Section 7)

Present Situation

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

Positive Train Control (PTC): The Rail Safety Improvement Act of 2008 required all Class I railroad main lines (lines over which five million or more gross tons are transported annually) handling any poisonous-inhalation-hazardous materials, and any railroad main lines over which regularly scheduled intercity passenger or commuter rail services are provided, to install PTC by December 31, 2015. PTC is defined to mean "a system designed to prevent train-to-train collisions, over-speed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position."[63] PTC systems use digital radio communications, global positioning, and fixed wayside signal systems to send and receive in real time a continuous stream of data about the location, direction, and speed of trains. The FRA concluded in August of 2015 that most railroads had not made sufficient progress to meet the December 2015 implementation deadline, despite the FRA's actions to assist railroads, the statutory deadline, and the threat of aggressive enforcement actions, including the imposition of significant civil penalties.[64, 65]

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[62] *Supra* note 52.
[63] 49 U.S.C. 20157(i)(5).
[64] *See* the FRA's *Status Report to House and Senate Committees on Appropriations*, August 2015, available at: https://www.fra.dot.gov/eLib/details/L16962. (Last visited March 10, 2017.)
[65] The FRA's latest data, November 28, 2016: "Freight railroads now have PTC active on 12 percent of their tracks, up from 9 percent last quarter. Passenger railroads increased their percentage to 23 percent this quarter compared to 22 percent last quarter. The measurable progress made by passenger railroads has been predominately on the West Coast, while East Coast railroads, other than SEPTA and Amtrak, have remained relatively stagnant." *See* the FRA website available at: https://www.fra.dot.gov/eLib/details/L18436#p1_z5_gD. (Last visited March 10, 2017.)

Effect of Proposed Changes

Section 7 of the bill creates s. 341.607, F.S., setting out minimum safety standards for a HSPR system.

Compliance with Federal Law and Regulation: This section of the bill requires a railroad company operating a HSPR system to comply with all federal laws and regulations administered by the FRA. This provision in state law would mirror current federal law.

Positive Train Control (PTC): This section of the bill also requires a railroad company operating a HSPR system to install safety technology approved by the FRA, which at a minimum must include PTC. As the FRA has issued a final rule on PTC, it appears that this provision of the bill may be preempted.

Additional Minimum Safety Standards for HSPR and Maintenance/Repair of Roadbeds, Tracks, Culverts, and Certain Streets and Sidewalks (Sections 7 and 8)

Present Situation

Railroad-Highway Grade Crossing Responsibility: The FDOT is granted regulatory authority over all public railroad-highway grade crossings[66] in the state, including issuance of permits required to open and close any such crossing. 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 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.[67]

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.[68] The applicable regulation sets out a railroad's required share of

[66] Defined to mean a location at which a railroad track is crossed at grade by a public road. Section 335.141(1)(b), F.S.
[67] Section 335.141(2)(c), F.S.
[68] 23 C.F.R. 646.210 (4-1-16).

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).[69, 70]
- 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.[71]

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.[72]

Remote Health Monitoring (RHM): RMH 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.[73] 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 *should* include remote health (status) monitoring capable of automatically notifying railroad or signal maintenance personnel when anomalies have occurred within the system."[74] The MUTCD similarly provides that four-quadrant gate systems *should* include RHM but it does not *mandate* RHM inclusion.[75]

Crossing Gate Installation, Maintenance of Railroad 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

[69] Section 351.03(1), F.S.
[70] The MUTCD is the national standard for all traffic control devices installed on any street, highway, bikeway, or private road open to travel and are 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 March 12, 2017.)
[71] Section 351.03(2), F.S.
[72] Section 351.141(2)(d), F.S.
[73] *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 March 10, 2017.)
[74] *See* the FRA *On-Site Engineering Field Report – Part 2*. (On file in the Senate Transportation Committee.)
[75] *See* the MUTCD, Part 8, s. 8C.06, available at: https://mutcd.fhwa.dot.gov/pdfs/2009r1r2/part8.pdf. (Last visited March 10, 2017.)

financial responsibility for crossing signal installations, capital improvements for track beds and roadway surfaces, crossing maintenance costs, and pedestrian gates and sidewalks.[76]

Effect of Proposed Changes

Section 7, in the newly created s. 341.607, F.S., the bill requires a railroad company, before operating a HSPR system, to equip all automatic public railroad-highway grade crossing warning systems with RHM technology approved by the FRA. The technology must be capable of detecting false activations and other crossing signal malfunctions and notifying the train dispatcher and crossing signal maintenance personnel when a malfunction occurs.

In addition, before operating a HSPR system, the railroad company is required to:

- Install or realign crossing gates, including those at severely skewed acute-angled locations as identified by the FDOT or the FRA, such that the gates are parallel to the tracks and in accordance with the most recent edition of the Manual on Uniform Traffic Control Devices published by the Federal Highway Administration and adopted by the state pursuant to s. 316.0745, F.S., and
- Construct and maintain fencing in accordance with newly created s. 341.611, F.S., discussed below under the heading, "Fencing Requirements."

Section 8 of the bill creates s. 341.608, F.S., to impose the following requirements on a railroad company that constructs or operates a HSPR system:

- If a HSPR system is on tracks that intersect with a public street or highway at grade, the railroad company must, at its sole cost and expense, construct, maintain, renew, and repair all railroad roadbed, track, and railroad culverts within the confines of the public street or highway, and the streets or pedestrian grade crossings lying between the rails and for a distance outside the rails of one foot beyond the end of the railroad ties.
- 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.[77]

The bill provides that this newly created s. 341.608, F.S., does not impair any existing contractual agreements between the railroad company operating the HSPR system and a governmental entity within the state.

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

[76] *Supra,* note 44.

[77] 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 March 11, 2017.)

"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, such a state law requirement may be valid for HSPR systems that are not already covered by a contractual agreement that imposes responsibility for such costs.

Crossing Gate Installation/Realignment, Maintenance of Railroad Roadbed/Track/Culverts/ Streets/Sidewalks: 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, as provided in the bill, 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). As an example, see *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533 (2008), holding that a virtually identical Michigan statute was not preempted by the ICCTA.[78]

Safety Inspections and Inspectors (Section 9)

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.[79]

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.

[78] The court specifically did not address FRSA preemption.
[79] *See* the FRA website available at: https://www.fra.dot.gov/Page/P0014. (Last visited March 12, 2017.) *See* also 49 C.F.R. part 212.

Effect of Proposed Changes

Section 9 of the bill creates s. 341.609, 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 public 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."[80] Such reports may be available from the FRA if requested under the Freedom of Information Act (FOIA).[81] The FOIA expressly exempts, for example, trade secrets and commercial or financial information from its application.[82]

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.[83] 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."

Fencing Requirements (Sections 7 and 10)

Present Situation

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.[84]

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

[80] "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."
[81] 5 U.S.C. 552.
[82] 5 U.S.C. 552
[83] *See* the FDOT's email to committee staff, February 22, 2017. (On file in the Senate Transportation Committee.
[84] *See* the report, *Countermeasures to Mitigate Intentional Deaths on Railroad Rights-of-Way: Lessons Learned and Next Steps*, available at: https://www.researchgate.net/publication/299545240_Countermeasures_to_Mitigate_Intentional_Deaths_on_Railroad_Rights-of-Way_Lessons_Learned_and_Next_Steps. (Last visited March 12, 2017.)

certain exceptions.[85] 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.[86] Research reveals no challenge to these state requirements.

Effect of Proposed Changes

Section 7 of the bill, in newly created s. 341.607, F.S., requires a railroad company, before operating a high-speed passenger rail system, to construct and maintain fencing in accordance with new s. 341.611, F.S.

Section 10 of the bill creates s. 341.611, F.S., requiring the FDOT to adopt rules identifying standards for conducting field surveys of the rail corridor being used by a HSPR system. The field surveys must indicate areas where fencing is necessary for the public's health, safety, and welfare. The field surveys should, at a minimum, identify nearby pedestrian traffic generators and signs of current pedestrian traffic that crosses the railroad tracks. The FDOT must hold at least one public meeting in each community where new or substantially modified fencing is proposed before designs and plans for such fencing are finalized.

If a determination is made that fence is necessary to protect the surrounding community, the railroad company operating a HSPR system must construct and maintain the fence on both sides of its railroad tracks sufficient to prevent intrusion. The fencing (at least 4 ½ feet high) must be placed one foot inside the edge of the railroad company's right-of-way, except in locations where the railroad intersects with a highway or road. Ornamental fencing must be used within urban areas; chain link fencing may be used outside of urban areas. The railroad company must maintain the fencing, and is liable for all damages arising from the railroad's failure to construct or maintain a required fence, unless a separate contract with a property owner or local government specifically addresses maintenance.

Whether these provisions would withstand a challenge on grounds of preemption by federal law is unclear.

Operation over the Tracks of Another Railroad Company (Section 11)

Present Situation

Existing agreements between cities and counties place financial responsibility for crossing signal installations, capital improvements for track beds and roadway surfaces, crossing maintenance costs, and pedestrian gates and sidewalks on the cities and counties.

Effect of Proposed Changes

Section 11 of the bill creates s. 341.612, F.S., deeming a railroad company operating a HSPR system solely responsible for all rail corridor improvements or upgrades relating to the system's operation and safety. The bill provides that neither a local government nor the state is responsible

[85] Section 219.31, Minnesota Statutes.
[86] RRD, Article 3, s. 52-B, Laws of New York.

for any costs associated with the construction and maintenance of the improvements necessary to operate a HSPR system, unless it expressly consents in writing. To the extent that existing agreements place responsibility for any portion of the cost of such improvements or upgrades on the cities and counties, such responsibility appears to remain with the cities and counties under the contracts. In the absence of any such agreement or unless the state or local government consents in writing to responsibility, the bill would place the responsibility for such costs with the railroad company.

Administrative Fines (Section 12)

Present Situation

Section 341.302(7) and (8), F.S., respectively, require the FDOT to develop and administer state standards relating to the safety and performance of rail systems and, in accordance with the applicable federal regulations, assess penalties for failure to adhere to the standards. The agreement between the FRA and the FDOT covering the State Safety Participation program appears to provide the FDOT with authority to assess penalties under s. 341.302, F.S. However, 49 C.F.R. part 212, subpart B, 212.113 expressly reserves to the FRA the authority to assess penalties, issue emergency and compliance orders, institute actions for collection of civil penalties or for injunctive relief, and to initiate all other enforcement actions under the federal railroad safety laws. States may bring an action for assessment and collection of a civil penalty in a federal district court of proper venue if the FRA has not timely acted on a state's request to initiate an action.

Effect of Proposed Changes

Section 12 of the bill creates s. 341.613, F.S., authorizing the FDOT to bring actions for the assessment and collection of civil penalties or for injunctive relief pursuant to 49 C.F.R. part 212, subpart B. This provision mirrors federal law.

Jurisdiction (Section 13)

Present Situation

Section 316.640 provides for enforcement of the traffic laws of this state and assigns authority to various state, county, and municipal entities for that purpose. Generally, the Florida Highway Patrol, county sheriff offices, and municipal police departments are authorized to enforce all of the traffic laws of this state on all streets and highways. The FDOT is granted authority to enforce on all the streets and highways of this state all laws applicable within its authority.[87]

Section 335.141(4), F.S., grants the FDOT authority to regulate the speed limits of railroad traffic on a municipal, county, regional, or statewide basis as established by an FDOT order; *i.e.*,; agency action under the provisions of chapter 120. Any penalty for a violation of s. 316.640, F.S., must be imposed on the railroad company guilty of a violation. The FDOT's jurisdiction to enforce speed limits of railroad traffic is as provided in s. 316.640, F.S. The FDOT advises it

[87] Section 316.640(1)(b)1., F.S.

does not have a rule regulating train speed limits and does not regulate train speeds in any fashion given case law holding that such state regulations are preempted.[88]

Effect of Proposed Changes

Section 13 of the bill creates s. 341.614, F.S., providing that jurisdiction to enforce the bill's provisions shall be as provided by s. 316.640, and any penalty for violation of those provisions shall be imposed on the railroad company that commits such violation.

The validity of this provision appears to turn on whether the specific requirement being enforced is preempted.

Section 14 of the bill provides the act take effect on July 1, 2017.

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. Railroads may incur costs associated with the following:

- Reporting requirements (section 6);
- PTC safety technology installation and use (section 7);
- Railroad-highway grade crossing responsibilities (sections 7 and 8);
- Fencing requirements (section 10);
- Rail corridor improvements or upgrades (section 11); and

[88] FDOT email to committee staff, March 13, 2017. *See CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), holding: "Although, on their face, § 213.9(a)'s provisions address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate, the overall structure of the Secretary's regulations demonstrates that these speed limits were adopted with safety concerns in mind and should be understood as "covering the subject matter" in question."

- Penalties for any violations (section 12).

To the extent the bill's authorizations in section 13 for the FDOT to assess penalties is not preempted, railroads may incur costs for penalties if violations occur. 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 7, 8, 10, and 11 allow a local government to reduce 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 rules (sections 5, 6, and 9);
- Providing the required hazardous material training (section 5);
- Publishing accident and inspection reports (sections 6 and 9);
- Holding public meetings (section 10).

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, 341.611, 341.612, 341.613, 341.614, and 341.615.

IX. Additional Information:

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

None.

B. Amendments:

None.