ALL ABOARD FLORIDA

161 NW 6th Street, Suite 900, Miami, FL 33136

April 30, 2018

VIA E-MAIL

The Honorable Mark Meadows
Chairman, Subcommittee on Government Operations
2157 Rayburn Building
Washington, DC 20515

Re: Follow up from Hearing 04/19/2018, Response to Questions

Dear Congressman Meadows:

We have received two questions from your office regarding the Phase II Brightline Construction Project from West Palm Beach, Florida to Orlando, Florida ("Project") and the applicability of Private Activity Bonds ("PABs") to the Project. During the past four years I have been heavily involved with various aspects of the Project generally, and the PABs litigation in particular. As such, we thought it might be helpful for me to address these questions, as well as others raised at the hearing.

Question 1) How is Brightline specifically addressing the counties' concerns regarding the ongoing maintenance at grade crossings along the Brightline route?

Response:

Throughout the last century, various counties and municipalities adjacent to the Florida East Coast Railway ("FECR") corridor have requested the right to place public at-grade crossings on FECR's private property. Rather than refuse to authorize these crossings or require that grade separations (bridges) be constructed over the corridor, FECR agreed to placement of these crossings with the reasonable conditions that the counties and municipalities pay for 1) the installation of any new crossing warning devices and roadway surfaces, and 2) the maintenance of those crossing warning devices and roadway surfaces.

Now that these counties have had the benefit of many decades of usage of FECR's private property, some counties, in particular, Martin and Indian River counties, are asserting that that they no longer should be obligated to pay crossing maintenance associated with the portion of the crossings which is being installed as a part of the Brightline Project. If these counties believe that the agreements, which they readily and voluntarily signed, do not obligate them to pay for this additional maintenance, then that is an issue which can be easily resolved in court proceedings, not in legislative hearings, since this is a matter of private contractual rights and obligations.

However, since we want to be responsive to your questions, let me offer the following thoughts:

1) The agreements provide that the counties are obligated to pay for all new infrastructure construction at these crossings. Nevertheless, Brightline has publicly advised that it will pay for that new infrastructure, at a cost of many tens of millions of dollars;

2) Even though the agreements are not executed directly between Brightline and these counties, FECR will operate on the new trackage constructed by Brightline, and the crossing warning devices will notify pedestrians and motorists of FECR trains as well as Brightline trains. Therefore, it is entirely appropriate that these new improvements be included within the scope of the existing crossing maintenance agreements;

3) The maintenance of these crossings is necessitated by virtue of the vehicles and pedestrians traversing the crossings, not by the trains which move on rails through these crossings. As such, the Federal Railroad Administration ("FRA"), in its regulations, has specifically concluded that crossing warning devices and crossing surfaces are of benefit to the adjoining communities; they are not of benefit to the railroads; and

4) As an accommodation, with respect to certain counties that have not opposed the Brightline Project, Brightline has agreed to absorb the crossing maintenance cost for a specified number of years. We have not agreed to such accommodation with respect to counties who continue to sue us in an effort to impede or delay construction of this Project.

Question 2) Whether receipt of the Title 23 funds by All Aboard Florida preceded the Brightline concept, or the start of Brightline construction?

Response:

Although this question has a narrow focus, it was clear that several committee members were interested in the overall applicability of PABs to the Project. As such, we are respectfully expanding our answer to include a discussion of PABs applicability.

In 2005, Congress enacted SAFETEA-LU, which amended the Internal Revenue Code at 26 U.S.C. § 142, by expanding the list of Projects eligible for PABs allocations. In particular, eligibility was added for "qualified highway or surface freight transfer facilities," a term *expressly defined* to include "any Surface Transportation Project which receives Federal assistance under title 23, [U.S.C.]." *See* Pub. L. No. 109-59, § 11143, 119 Stat. 1144, 1963-64; 26 U.S.C. § 142(a)(15) & (m)(1)(A).

Thus, when reviewing USDOT's decision to approve a PABs allocation for the Brightline Project, the dispositive question is whether the Project is a "Surface Transportation Project" which "receives Federal assistance under title 23." The Brightline Project meets both requirements.

The Internal Revenue Code does not define the term "Surface Transportation Project" itself, but the plain meaning of that term unquestionably encompasses a passenger rail project, and

my attachment to this letter includes various other examples where USDOT has defined "Surface Transportation Project" to include passenger rail projects, such as Denver's rail line construction from the airport to Union Station and Maryland's Purple Line construction.

Likewise, since the planning process for the Brightline Project began in December 2011, the Project has received approximately $9 million in funds under 23 U.S.C. § 130 to improve railway-highway grade crossings and to prepare the rail corridor for the reintroduction of passenger service and other potential growth in rail traffic. Of that $9 million in Title 23 funds, approximately $6 million was used to fund improvements within the portion of the rail corridor to be used for Phase I of the Project, which spans from Miami to West Palm Beach, and approximately $3 million was used to fund improvements within the portion of the rail corridor to be used for Phase II of the Project, which will run from West Palm Beach to Cocoa and then head west to Orlando. USDOT received this Title 23 funding information as a predicate to the Brightline PABs allocation.

The determination to initiate the Brightline Project was made in December of 2011. Thus, although Title 23 funds had been utilized on the rail corridor prior to December of 2011, only funds utilized subsequent to that determination were identified as a basis for the PABs allocation.

In 2014, USDOT approved a PABs allocation for the Brightline Project in the amount of $1.75 billion, recognizing that it is in fact a "Surface Transportation Project" which "receives Federal assistance under title 23." The proceeds of those PABs were to be used to finance the development of Phase I and the portions of Phase II within Palm Beach, Brevard, and Orange Counties.

Per Brightline's request, that initial PABs allocation was subsequently withdrawn and replaced with two smaller allocations – one in the amount of $600 million for use in financing Phase I, and the other in the amount of $1.15 billion for use in financing the portions of Phase II within Palm Beach, Brevard, and Orange Counties. Brightline has since completed an offering of PABs in the amount of $600 million for Phase I, but has not yet gone to market with an offering for Phase II.

In 2015, Indian River and Martin Counties each filed lawsuits in the U.S. District Court for the District of Columbia challenging USDOT's initial PABs allocation for the Brightline Project. Indian River County asserted that the allocation violated the National Environmental Policy Act ("NEPA") and other environmental statutes, but did not dispute that the Project is eligible for PABs under 26 U.S.C. § 142. Martin County, in turn, also asserted that the allocation violated NEPA and tacked on a claim that the Project was not eligible for PABs under 26 U.S.C. § 142. The Court subsequently dismissed that claim, finding Martin County was not within the zone of interests protected by that statute and therefore effectively lacked standing to argue that the Project was not eligible for PABs under 26 U.S.C. § 142. The Court ultimately dismissed the balance of the cases as moot in light of the withdrawal of the initial PABs allocation.

Earlier this year, Indian River and Martin Counties jointly filed a new lawsuit in the U.S. District Court for the District of Columbia challenging USDOT's recent PABs allocation for Phase II. Notwithstanding the Court's prior ruling, the new lawsuit once again asserts that the Project is not eligible for PABs under 26 U.S.C. § 142. The counties have argued that Congress' intent in Section 142 was for the term "any surface transportation project" to mean "any *highway* project."

The Counties' argument in this regard fails for several reasons, beginning with the plain language of the statute, which is the clearest indication of Congress' intent. In Section 142(m)(1)(A), Congress chose to insert the all-inclusive modifier "any" before "surface transportation project." Had Congress intended to include only certain kinds of "surface transportation projects," such as "highway projects," it could have easily done so with less expansive language. It did not. Thus, the statute must be read to mean what it says; it covers *any* "surface transportation project," which indisputably includes passenger rail. I have included an attachment which details various other factors supporting the applicability of PABs to the Brightline Project.

I should also note that taxpayers are not at risk by the use of PABs. The federal government does not guarantee the bonds, subsidize the interest rate on the bonds, or assume any liability for the Project. They do not impact the credit, borrowing or debt load capacity of the state, counties or municipalities. Private investors assume 100% of the risk and, while the investors receive a tax-credit, federal, state, and local governments receive millions of dollars in new tax revenue which result from the investment. In Florida, it is estimated that Brightline will generate more than $650 million dollars in tax revenue to federal, state and local governments, $6 billion in positive economic impact over eight years, and thousands of new jobs. Indeed, Brightline is realizing the precise purpose of tax exempt bonds such as PABs. The bonds promote private investment in necessary state and local infrastructure for public use and benefit.

Question 3) Congressman Posey asked several questions about the safety of the at-grade rail crossings.

Response:

The at-grade crossings on the Brightline system will incorporate the best and most modern forms of crossing technology available.

Prior to commencing the federal environmental and safety review of this Project, a diagnostic team was formed to analyze the appropriate warning devices at each grade crossing. The team consisted of engineers from the FRA, Florida Department of Transportation, Brightline, FECR, and various county and local municipalities. The team quite literally observed the configuration at each crossing and made recommendations for appropriate warning devices.

Thereafter, FRA, which is the agency charged with railroad safety oversight in the United States, conducted four separate reviews of Brightline's crossings and identified the appropriate warning devices to be implemented at each of those crossings. The FRA requirements at these crossings are based on, in part, the diagnostic team review, as well as consideration of over 15,000 public comments in connection with this Project.

Pursuant to FRA's Sealed Corridor Guidelines, where Brightline trains traverse crossings at 80 mph or greater, the crossings will incorporate vehicle presence detection, health monitoring, and "four quadrant" gates. Further, positive train control will be implemented on the entire corridor, which will enable remote stoppage of trains if speed limitations are exceeded.

The photographs displayed by Congressman Posey, at the recent legislative hearing, do not depict the anticipated warning device construction at these crossings because, of course, the construction from West Palm Beach to Orlando has not yet commenced.

We look forward to meeting with Congressman Posey, in order to provide greater details as to anticipated crossing warning device construction.

Question 4) Martin County's Fire Rescue Division Chief Wouters raised concerns about the ability of first responders to quickly respond to incidents.

Response:

The Brightline trains moving through the Treasure Coast will quite literally clear crossings (from gates descending to gates ascending) in approximately 45 seconds, less than the average stop light. As such, we do not expect any disruption in the ability of first responders to access locations on either side of the tracks as a result of our operations.

Further, as with first responders in Phase I of our operation, we will be meeting with Treasure Coast first responders on a regular basis to ensure that they are fully apprised of our operations and the manner in which we can work together to safely handle incidents in and around the rail line. We have worked with Phase I area first responders on training, both classroom and field operations, and will continue to do so in Phase II. Indeed, Martin County first responders have already been invited to our Phase I training classes.

We will look forward to continuing our dialogue with Chief Wouters as we move into the Phase II construction process.

Very truly yours,

Myles J. Tobin

Myles Tobin, Esq.*
General Counsel

* *Member of the Illinois Bar only, and not a member of the Florida Bar*

ATTACHMENT RE: PABs APPLICABILITY

Many factors support USDOT's interpretation that 26 U.S.C. § 142 covers Brightline:

- Section 142(m)(2)(C) gives the Secretary very broad decision to make allocation decisions "as he determines appropriate."

- USDOT has consistently applied 142(m) to allow for allocations to passenger rail. In 2010, USDOT approved an allocation of approximately $398 million in private activity bonds for a passenger rail project from Denver International Airport to Denver's Union Station under the same provision under which Brightline received its allocations. Likewise, in 2014, USDOT approved an allocation under the same provision of approximately $1.3 billion in private activity bonds for a passenger rail project in Maryland known as the "Purple Line."

- USDOT's interpretation fulfills the purpose of the statute to facilitate the use of private funds to improve crumbling or insufficient infrastructure.

- Between 1997 and 2001, several bills were proposed that would have allowed PABs allocations only for highway projects. See S. 275, 105th Cong. § 2(1)(A) (1997) (defining a "qualified highway infrastructure project" as a project for "the construction or reconstruction of a highway"); S. 470, 106th Cong. § 2(1)(A)(i) (1999) (defining a "qualified highway infrastructure project" as a project for "the construction or reconstruction of a highway"); S. 870, 107th Cong. § 2(1)(A) (2001) (defining a "qualified highway infrastructure project" as a project for the "construction, reconstruction, or maintenance, or maintenance of a highway…"). None of those bills was adopted. Instead, following years of negotiations, Congress enacted SAFETEA-LU, explicitly and broadly defining the term "qualified highway or surface freight transfer facilities" to include "any surface transportation project which receives Federal assistance under title 23." 26 U.S.C. § 142(m)(1)(A). If Congress had intended for the term "qualified highway or surface freight transfer facilities" to include only highway projects which receive Federal assistance under Title 23, they could have—and would have—defined that term differently.

- Funds for rail-highway crossings are not the only title 23 funds available for rail projects. Title 23 includes the Transportation Infrastructure Finance and Innovation Act ("TIFIA") program, which provides federal assistance in the form of secured loans, loan guarantees and lines of credit for eligible projects. See 23 U.S.C. §§ 603, 604. Eligible projects are defined to include "a project for intercity passenger bus or rail facilities and vehicles." 23 U.S.C. § 601(a)(12). This further supports the conclusion that Congress intended PABs to be available for passenger rail projects under Section 142(m).

The Counties have argued that, under 26 U.S.C. § 142(m), only those discrete *portions* of a "surface transportation project" which actually receive Title 23 funding are eligible for PABs. However, this argument finds no basis in the statute either. The statutory language does not in any way restrict eligibility to the discrete project components which receive Title 23 funding. It makes clear that the projects themselves shall be eligible, not individual components thereof. It also accords USDOT nearly complete discretion to decide how to allocate tax exemptions, stating that they shall be allocated "in such manner as the Secretary determines appropriate." *Id.* § 142(m)(2)(C).

Recognizing this, the Counties have sought to import into 26 U.S.C. § 142(m) the definition of "project" in Title 23, which they contend would narrow the field of projects which are eligible for PABs. Once again, however, they are mistaken. The Federal Highway Administration ("FHWA"), which administers Title 23, has addressed this issue and rejected the argument being advanced. It found that for purposes of 26 U.S.C. § 142(m), the most reasonable definition of "project" is the *overall* surface transportation project, not just the segment(s) which received Title 23 funds.

FHWA weighed in on this shortly after the enactment of SAFETEA-LU, in an opinion letter to the IRS. *See* Ltr. from FHWA Acting Chief Counsel, Edward Kussy to IRS Chief Counsel, Donald Korb, 10/07/05. FHWA explained that "we believe the most reasonable reading of [Section 142(m)] permits the proceeds of private activity bonds (PAB) authorized by this provision to be used on the *entire* transportation facility that is being financed and constructed even though only a portion of that facility receives Federal assistance under title 23." *Id.* at 2. The letter then went on to point out that it is common for only a portion of a transportation facility to receive Title 23 funds, in part because such funds subject recipients to various federal requirements. *Id.* Thus, a narrow reading of the term "project" would "distort the longstanding way in which facilities are actually funded, create needless red tape, and artificially result in the extension of Federal requirements that have nothing to do with the bonding of transportation facilities." *Id.* FHWA also observed that other statutory provisions and the legislative history of SAFETEA-LU indicate that Congress did not intend to interfere with how states choose to fund transportation projects, which is exactly what a narrow reading of "project" would do. *Id.* Finally, FHWA stressed that PABs are likely to be secured by a revenue stream from the project as a whole, rather than a discrete segment thereof, and that it therefore makes sense to allow such bonds to fund the project as a whole. *Id.*

Indeed, the Counties' strained interpretation of Section 142(m) would greatly limit the utility of PABs by making them available only for portions of a project which are *already* receiving federal funding and are therefore *least likely* to need additional financing. There is simply no evidence in the statutory language – or in the purpose of the statute – that Congress intended to restrict the use of tax-exempt facility bond financing in such an illogical manner.

Undaunted, the Counties also argue that the Brightline Project is not eligible for a PABs allocation because Brightline does not own the historic rail corridor which is being improved and used for the Project, on which the Title 23 funds have been spent. The Counties contend that Brightline has not *itself* received a single dollar of Title 23 funds, the corridor has. They say Brightline "relies on Title 23 funds spent prior to August 2014 on railway-highway grade crossing improvement

projects undertaken by FDOT on the FECR corridor." The statutory provisions authorizing PABs do not require that the project proponent own the transportation facility on which Title 23 funds were spent in order to be eligible for PABs. Nor do they require that the project proponent receive the Title 23 funds relied upon in applying for PABs. They require only that the "project" receive such funding. It is irrelevant which entity or entities the funding was funneled through, so long as the "project" received Title 23 funds.

That requirement was clearly met here, as the approximately $9 million in question was utilized to improve railway-highway grade crossings which are active and in use today, and to prepare the rail corridor for the reintroduction of passenger service and other potential growth in rail traffic.