



## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Part 383

[Docket No. FMCSA-2018-0292]

RIN 2126-AC14

#### Third Party Commercial Driver's License Testers; Withdrawal

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking; withdrawal.

**SUMMARY:** FMCSA is withdrawing a notice of proposed rulemaking (NPRM) to allow States to permit a third party skills test examiner to administer the Commercial Driver's License (CDL) skills test to applicants to whom the examiner has also provided skills training, a practice now prohibited under FMCSA regulations. FMCSA takes this action after considering the comments received following publication of the NPRM, as explained further below.

**DATES:** The proposed rule published July 9, 2019, at 84 FR 32689, is withdrawn as of [Insert date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Ms. Nikki McDavid, Chief, Commercial Driver's License Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001, (202) 366-0831, [nikki.mcdavid@dot.gov](mailto:nikki.mcdavid@dot.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

In October 2017, as part of the Department's review of existing regulations to evaluate their continued necessity and effectiveness, DOT published a "Notification of

Regulatory Review” seeking public input on existing rules and other agency actions (82 FR 45750 (Oct. 2, 2017)). In response to that notification, SAGE Truck Driving Schools (SAGE) recommended that FMCSA eliminate the prohibition, set forth in §383.75(a)(7), that prevents States from permitting a third party skills examiner from administering a CDL skills test to an applicant who received skills training from that examiner. In support of its recommendation, SAGE asserted that the prohibition is unnecessary because: (1) State-based CDL testing compliance agencies have many other effective tools to detect and prevent fraud in CDL skills testing; (2) the rule causes significant inconvenience and cost for third party testers, CDL applicants, the transportation industry, and the public; (3) it needlessly makes CDL training and testing operation more difficult and costly, thereby exacerbating the CMV driver shortage; and (4) it contributes to CDL testing delays in some States.

On July 9, 2019, FMCSA published an NPRM<sup>1</sup> to amend 49 CFR 383.75(a)(7) to allow States to permit a third party skills test examiner to administer the CDL skills test to applicants to whom the examiner has also provided skills training. This practice is currently prohibited under 49 CFR 383.75(a)(7). When issuing the proposal, the Agency noted that lifting the restriction could potentially alleviate skills testing delays and reduce cost and inconvenience for third party testers and CDL applicants, without negatively impacting safety.

The Agency received 95 comments on the NPRM before the deadline of September 9, 2019. Most comments were submitted by individuals, many of whom identified themselves as trainers, testers, or drivers. Several organizations commented on the proposal, including the American Bus Association, Commercial Vehicle Training

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<sup>1</sup> To view the NPRM and comments, go to <https://www.regulations.gov/document/FMCSA-2018-0292-0002>.

Association (CVTA), Truckload Carriers Association, National Limousine Association, American Trucking Associations, the Minnesota Trucking Association, and the Minnesota School Bus Operators Association. The following State driver licensing agencies also commented on the NPRM: Virginia Department of Motor Vehicles; Missouri Department of Revenue; Oregon Department of Transportation, Driver and Motor Vehicle Services; Washington State Department of Licensing; and Minnesota Department of Public Safety, Driver and Vehicle Services Division.

Most commenters opposed the NPRM, citing concerns about fraud, conflict of interest, or examiner bias. These commenters argued that allowing the same individual to train and test the applicant could undermine the integrity of the skills testing process, thereby negatively impacting safety. As one individual noted, “The proposed rule removes the necessary impartiality of the CDL examiner, allowing the instructor to fail or pass student drivers with whom they have developed a relationship. This is not a fair assessment of the candidates’ abilities.” A commenter identifying as a trainer with 22 years of experience expressed a similar concern, explaining that “the reason another trainer has to test my student is to prevent bias or just passing them along.” Another commenter said that, while some companies “will do due diligence to make sure drivers are trained properly,” lifting the restriction would remove necessary checks and balances from the skills testing process. The Minnesota Trucking Association stated that lifting the restriction “would cause an increased risk of intentional and unintentional bias in testing results.” One individual observed that current alternative approaches to detecting fraud in CDL testing, identified in the NPRM, “rely on the principle of deterrence rather than prevention...which allows unqualified drivers to obtain their CDLs and legally operate

[commercial] motor vehicles on public roadways without proper training – at least until the fraud is discovered.”

All of the States that commented on the NPRM (Virginia, Oregon, Washington, Minnesota, and Missouri) also raised concern that lifting the prohibition could negatively impact safety by undermining the integrity of skills testing. As Washington stated, the NPRM “adds substantial risk” to third party testing “by introducing an apparent conflict of interest.”

Additionally, three States voiced concerns about accepting skills testing results for applicants tested in States that had lifted the restriction. Oregon stated that, while the proposed change is “permissive in nature, given the requirement to accept out-of-State CDL skills test results, adoption by other jurisdictions will pose a risk that we have deemed unacceptable.” Similarly, Virginia noted it would be “unable to guard against fraud in these situations and that unsafe drivers will be licensed to drive interstate impacting safety in Virginia and elsewhere.” Washington expressed “strong concerns with accepting skills test results from other jurisdictions allowing [third party skills test examiners] to test the individuals they train.”

Most of the organizations that commented in support of the proposal believed that lifting the restriction would not compromise safety, due to the extensive fraud detection measures already in place. As CVTA noted, “[t]hird party testing occurs within a powerful network of state and federal regulation...[which] upholds the integrity of the examination process because it monitors examiner activity to prevent fraud.” Some individual commenters argued that permitting the same individual to train and test the applicant would not result in a conflict of interest. One instructor stated he finds the current restriction offensive because it presumes that “all teachers are frauds and not trustworthy to test their own students.” Several commenters asserted that lifting the

restriction could enhance safety by expanding the opportunity for students to benefit from the expertise of different instructors.

Some commenters supporting the proposal said that it would increase flexibility and efficiencies for both applicants and third party testers and would alleviate skills testing delays. For example, Greyhound Lines, Inc. stated that “[a]llowing Greyhound trainers to administer the CDL test to the drivers they train enables the drivers who pass the test to start their work assignments earlier than if they have to wait for a State-administered test.”

The Agency carefully considered all comments. FMCSA acknowledges the NPRM’s potential for increasing the efficiency and flexibility of the skills testing process and reducing skills test delays.<sup>2</sup> The Agency is persuaded, however, by numerous comments citing the NPRM’s potential for undermining the integrity of the CDL skills testing process and negatively impacting highway safety. FMCSA has therefore decided to retain the current regulation (49 CFR 383.75(a)(7)) prohibiting States from permitting a third party skills test examiner to administer the CDL skills test to applicants to whom the examiner has also provided skills training. The Agency hereby withdraws the July 9, 2019, NPRM referenced above, based on the same legal authorities on which it issued the NPRM, set forth at 84 FR 32689, 32691.

Issued under authority delegated in 49 CFR 1.87.

Robin Hutcheson,  
Acting Administrator.

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<sup>2</sup>In the NPRM, FMCSA requested quantitative or qualitative data addressing the impact of the current prohibition on skills testing delays, but did not receive data addressing this issue.