

THE THIRD PARTY COMMERCIAL DRIVER’S LICENSE SKILLS TEST EXAMINERS REPORT TO CONGRESS

Pursuant to Section 20 of the Ocean Shipping Reform Act of 2022 (Pub. L. 117-146)
May 2023

INTRODUCTION

On June 16, 2022, the President signed into law the Ocean Shipping Reform Act of 2022 (OSRA), (Pub. L. 117-146, 136 Stat. 1272). Section 20 of OSRA, set forth below, directed the Administrator of the Federal Motor Carrier Safety Administration (FMCSA) to conduct a review of the Administrator-issued discretionary waiver authority described in the document “Waiver for States Concerning Third Party CDL Skills Test Examiners In Response to the COVID–19 Emergency,” dated August 31, 2021 (August 31 Waiver), for safety concerns. OSRA directed the Administrator to either make the August 31 Waiver permanent and amend 49 CFR 384.228, or submit a report explaining the reasons for declining to move forward with the rulemaking to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

FMCSA submits the results of its review of the discretionary waiver authority described in the August 31 Waiver. The Agency’s safety concerns and intended path forward for establishing regulatory standards for third party commercial driver’s license (CDL) knowledge test examiners are set forth below. FMCSA does not intend to make the August 31 Waiver permanent or revise 49 CFR 384.228 without proposing additional safeguards through notice and comment rulemaking.

At this time, the Federal regulations allow states to use third party knowledge test examiners, as long as the existing knowledge test standards and requirements set forth in 49 CFR part 383, subparts G and H, are met.

STATUTORY REQUIREMENT

Section 20 of OSRA requires the following:

(a) In General.- Not later than 90 days after the date of enactment of this Act [June 16, 2022], the Administrator of the Federal Motor Carrier Safety Administration (referred to in this section as the “Administrator”) shall conduct a review of the discretionary waiver authority described in the document issued by the Administrator entitled “Waiver for States Concerning Third Party CDL Skills Test Examiners In Response to the COVID–19 Emergency” and dated August 31, 2021, for safety concerns.

(b) Permanent Waiver.- If the Administrator finds no safety concerns after conducting a review under subsection (a), the Administrator shall-

(1) notwithstanding any other provision of law, make the waiver permanent; and
(2) not later than 90 days after completing the review under subsection (a), revise section 384.228 of title 49, Code of Federal Regulations, to provide that the discretionary waiver authority referred to in subsection (a) shall be permanent.

(c) Report.- If the Administrator declines to move forward with a rulemaking for revision under subsection (b), the Administrator shall explain the reasons for declining to move forward with the rulemaking in a report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

BACKGROUND

On April 9, 2020,¹ FMCSA issued a document titled “Waiver for States Concerning Third Party CDL Skills Test Examiners In Response to the COVID-19 Emergency.”² The Agency subsequently re-issued this waiver on several occasions, including on August 31, 2021, which OSRA references.³

The August 31 Waiver permitted certified third party skills test examiners to administer the CDL knowledge tests without completing the state-employed required knowledge test examiner training requirements set forth in 49 CFR sections 384.228(b) and (c). As such, the August 31 Waiver allowed state-authorized third party skills test examiners who had maintained a valid CDL test examiner certification and had previously completed a CDL skills test examiner training course that satisfied the requirements of 49 CFR section 384.228(d) to administer the CDL knowledge test without completing a CDL knowledge test training course.

The August 31 Waiver required states to provide third party skills test examiners with access to written instructional materials, referenced in 49 CFR section 384.228(c)(3), regarding the general and specialized knowledge tests, administration of the knowledge tests, and the selection of appropriate tests and test forms.

The unique COVID-related state driver licensing agency (SDLA) closures and reduced staffing levels prompted FMCSA to issue the August 31 Waiver. The August 31 Waiver provided states a

¹ The Agency is authorized by statute to issue waivers for up to 3 months at a time. 49 U.S.C. section 31315(a)(1)).

² The Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, 112 Stat. 107, June 9, 1998) provides the Secretary of Transportation authority to grant waivers from any of the Federal Motor Carrier Safety Regulations issued under Chapter 313 of Title 49 of the United States Code, 49 U.S.C. section 31136, to a person(s) seeking regulatory relief (49 U.S.C. sections 31136(e) and 31315(a)). The Secretary must make a determination that the waiver is in the public interest and that it is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver.

³ Available at <https://www.fmcsa.dot.gov/emergency/waiver-states-concerning-third-party-cdl-skills-test-examiners-response-covid-19-3>. The Agency re-issued the waiver on June 22, 2020, September 18, 2020, December 15, 2020, February 16, 2021, May 26, 2021, August 31, 2021, and November 29, 2021, providing the same temporary relief.

means of allowing applicants to take the CDL knowledge test to obtain a commercial learner's permit (CLP) during the period of COVID-related disruptions to the SDLAs' licensing operations. Once the SDLA issued the driver a CLP, the driver could take behind-the-wheel training in preparation to take the skills test and obtain a CDL.

Then-existing FMCSA regulatory guidance stated that third parties could not administer the CDL knowledge test unless a state employee was present. The Agency amended this regulatory guidance on February 3, 2022 (February 3 Guidance).⁴ In its February 3 Guidance, the Agency explained that, upon reconsideration, FMCSA concluded that its current statutory authorities and regulations do not prohibit third party testers from administering the CDL knowledge tests. Therefore, FMCSA amended its guidance to explain that a state, at its discretion, may permit third parties to administer CDL knowledge tests in accordance with existing knowledge test standards and requirements set forth in 49 CFR part 383, subparts G and H. After issuing the February 3 Guidance and clarifying the legal requirements in this area, FMCSA issued a notice terminating the Waiver for States Concerning Third Party CDL Skills Test Examiners In Response to the COVID-19 Emergency.

In the February 3 Guidance, FMCSA encouraged states relying on third party knowledge test examiners to follow the training and record check standards currently applicable to state-employed knowledge test examiners, as set forth in 49 CFR section 384.228, but clarified that no regulations required that states follow the standards. The February 3 Guidance noted that the states' use of third party examiners would be more fully addressed in a forthcoming Notice of Proposed Rulemaking (NPRM). The Agency is currently drafting the NPRM that will address states' voluntary use of third party knowledge examiners and provide some flexibility for certified CDL skills testers who want to become certified CDL knowledge test examiners, entitled "Amendments to the Commercial Driver's License Requirements; Increased Flexibility for Testing and for Drivers After Passing the Skills Test" (RIN 2126-AC46).

SAFETY CONSIDERATIONS

The Agency has conducted the review required under Section 20(a) of OSRA and has identified safety concerns with making the August 31 Waiver permanent, and revising 49 CFR section 384.228 accordingly, without including additional safeguards.

Before issuing any waiver, the Agency must determine that the waiver would likely achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained absent the waiver, as required by 49 U.S.C. section 31315(a). When issuing and re-issuing the August 31 Waiver, FMCSA found that the August 31 Waiver would likely achieve a level of safety equivalent to the level of safety that would be obtained absent the August 31 Waiver. The Agency notes, however, that its finding of safety equivalency was premised on the temporary nature and limited scope of the regulatory relief granted in response to the unique circumstances

⁴ 87 FR 6045.

the COVID-19 emergency presented. Making the August 31 Waiver provisions permanent is another matter entirely and calls for consideration of a comprehensive regulatory framework applicable to the states' discretionary use of third party knowledge examiners, subject to public notice and comment.

The Agency's primary safety concern with making the August 31 Waiver permanent without additional safeguards is the lack of regulatory requirements for states to audit and monitor the operations of third party knowledge examiners to ensure that third parties administer the knowledge tests equitably and without fraud, which requires regulatory oversight by states and, when applicable, FMCSA. Further, the examiner training and record check requirements currently applicable to state knowledge test examiners should also apply to third party knowledge examiners. Should the August 31 Waiver be made permanent now, without additional safeguards, the integrity of the CDL knowledge testing program, and the safety benefit derived from CDL knowledge testing, would be undermined by the absence of state oversight and training and qualification requirements for third party knowledge examiners.

The training and record check requirements, currently applicable only to state knowledge test examiners, are also relevant for third party knowledge test examiners. These requirements, set forth in 49 CFR 384.228, include CDL licensing and testing programs training, including the general and specialized knowledge tests, and test administration. State knowledge examiners must pass the training course exam and complete refresher training every 4 years to maintain their certifications. States must also conduct criminal background checks on knowledge examiners before allowing them to administer the knowledge tests.

The states' auditing and monitoring requirements, currently applicable only to third party skills testers and examiners, are set forth in 49 CFR sections 383.75 and 384.229.⁵ Many of these standards may also be pertinent to states' oversight of third party knowledge examiners, including requirements that the state: (1) conduct an onsite inspection of third party tester operations at least once every 2 years, with a focus on examiners with unusually high or low pass/fail rates; (2) issue the third party tester (i.e., an entity that employs third party skills test examiners) a certificate upon the execution of third party skills testing agreement with the state; (3) issue a certificate to the third party skills test examiner; (4) include specific provisions in its third party testing agreement, including allowing FMCSA or its authorized representative to conduct random examinations, inspections and audits without prior notice; and (5) at least every 2 years, do one of the following for each third party skills examiner: have a state employee covertly take the skills tests administered by the third party; have a state employee co-score the skills test along with the third party examiner to compare pass/fail results; or re-test a sample of drivers examined by the third party.

⁵ FMCSA plans to submit an Information Collection Request to OMB related to the collection of information to assess, among other things, the effectiveness of third party CDL skills and knowledge testing and the minimum testing standards for CDL skills and knowledge tests (88 FR 10637 (Feb. 21, 2023)).

Further, there are other important program integrity issues that need to be addressed for third party knowledge testers and examiners, such as whether, and to what extent, the knowledge testing can be administered at a remote physical location outside the SDLA, or entirely online; how knowledge test results would be transmitted to the SDLA securely and efficiently by the third party; and how third party examiners would verify the identity of CLP applicants taking the knowledge test.

In addition to the safety concerns identified above, the Agency notes there are other implications of making the August 31 Waiver permanent. First, this approach would likely cause confusion by implying that third party knowledge tests can be administered *only* by certified third party skills testers, directly contradicting the February 3 Guidance explaining that, under current statutes and regulations, states may allow all third party examiners to administer the knowledge test in accordance with existing knowledge test standard and requirements in 49 CFR part 383, subparts G and H. Second, making the August 31 Waiver permanent without additional safeguards established through a notice and comment rulemaking is inconsistent with the Agency's intention to establish uniform standards for the states' use of third party knowledge testers and examiners. Finally, in light of FMCSA's reconsideration of its statutory authorities and regulations, leading FMCSA to issue the February 3 Guidance, the exemption from the examiner training requirements in 49 CFR sections 384.228 (b) and (c), as set forth in the August 31 Waiver, is no longer necessary. Because third party knowledge testing is not prohibited under statute or regulation, there is no regulatory requirement to be waived.

As noted previously, FMCSA is currently developing an NPRM that will propose minimum regulatory standards for states opting to allow third party knowledge testing. The proposed standards will address the safety concerns identified above and will include states' examiner training and record check requirements, as well as the states' required oversight and monitoring of third party testers and examiners. The standards would apply to all third party knowledge examiners, including examiners who are not already certified as third party skills test examiners. The Agency intends, however, to propose specific flexibilities for certified third party skills examiners who administer the CDL knowledge tests, as set forth in the August 31 Waiver.

FMCSA is aware of six states that currently permit third party knowledge testing following the approach in the third party knowledge testing waiver rescinded by the Agency, referenced above. Additionally, the state of Iowa recently passed legislation authorizing third party skills testers to administer the CDL knowledge tests in that state. The Iowa DOT has begun to implement this change and establish state-specific standards for third-party knowledge testing. The Agency anticipates that more states will permit third party knowledge testing after Federal regulatory standards are established through notice and comment rulemaking.

Given the program integrity concerns identified above, such as ensuring that examiners are qualified and properly trained and that the CDL knowledge tests are administered in accordance with existing test administration standards, FMCSA recently issued guidance, enclosed with this report, encouraging states that permit third party knowledge testing to voluntarily follow examiner training and record check requirements that already apply to state knowledge

examiners, as set forth in § 384.228, as well as applicable auditing and monitoring provisions of 384.229, which currently apply only to third party skills examiners. However, as noted in the guidance, these recommendations do not impose regulatory requirements.

CONCLUSION

FMCSA does not intend to move forward with making the August 31 Waiver permanent or revising 49 CFR 384.228 without proposing additional safeguards through notice and comment rulemaking, as identified above. This conclusion is based on safety concerns and related questions raised by the lack of oversight and training for third party knowledge examiners. Consistent with its statutory authority, FMCSA is committed to establishing minimum uniform standards applicable to states' discretionary use of third party knowledge testers and examiners that will ensure the integrity of the CDL knowledge testing program. In the interim, states are allowed to use third party knowledge test examiners, and the Agency has provided guidance for the states recommending best practices for the training and oversight of third party knowledge test examiners. This guidance is enclosed with this report and available at:

<https://www.fmcsa.dot.gov/registration/commercial-drivers-license/are-there-recommended-best-practices-if-state-permits-0>

Part 384 – State Compliance with Commercial Driver’s License Programs

States’ Voluntary Use of Third Party Knowledge Test Examiners

Third Party Knowledge Testing FAQ

Question 1: Are there recommended best practices if a State permits a third party examiner to administer CDL knowledge tests?

Guidance: Yes.

On February 3, 2022, FMCSA issued regulatory guidance clarifying that States may allow third party knowledge examiners to administer CDL knowledge tests in accordance with existing knowledge test standards and methods in 49 CFR subparts G and H (87 FR 6045); see, also FMCSA-CDL-383.75-Q01(2022-02-03). As noted in the guidance, FMCSA is currently developing a Notice of Proposed Rulemaking to address States’ voluntary use of third party knowledge examiners. In the interim, while there are no regulatory requirements currently applicable to States opting to rely on third party knowledge examiners, there are voluntary actions States can take to maintain the integrity of the CDL knowledge testing program:

Section § 384.228: Examiner Training and Record Checks

FMCSA encourages States to follow certain training and record check standards currently applicable to State and third party skills examiners, as set forth in 49 CFR 384.228. These include:

- having third party test examiners successfully complete a CDL test examiner training course providing an overview of the commercial licensing and testing requirements in 49 CFR part 383, including general and specialized knowledge test and test administration, before administering CDL knowledge tests; and
- conducting nationwide criminal background check of third party knowledge test examiners before allowing them to administer CDL knowledge tests; individuals with felony convictions within the last ten years, or fraud-related convictions, should not administer knowledge tests. (This recommendation does not include certified third party skills examiners who have already been subject to a background check under 49 CFR 384.228(h) and are administering knowledge tests).

Section 384.229: Skills Test Examiner Auditing and Monitoring

FMCSA also encourages States to follow applicable auditing and monitoring provisions of 49 CFR 384.229, which currently apply only to State and third party skills test examiners, when using third party knowledge examiners. These include:

- conducting unannounced, on-site inspections of third party testers' and examiners' records;
- conducting covert and overt monitoring of examinations performed by State and third party test examiners;
- tracking pass/fail rates of applicants tested by each State and third party test examiner to focus covert and overt monitoring on examiners who have unusually high pass or failure rates; and
- tracking the dates and results of any auditing or monitoring conducted by the State.

Contact Info: FMCSA Commercial Driver's License Division, CDLcompliance@dot.gov

Note: This guidance document does not have the force and effect of law and is not meant to bind the public in any way. It is intended only to provide information and clarity regarding existing requirements under the law or agency policies.

Regulatory Topic: States' Voluntary Use of Third Party Knowledge Test Examiners

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