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RACE TO THE TOP ASSESSMENT PROGRAM FREQUENTLY ASKED QUESTIONS ON INTELLECTUAL PROPERTY RIGHTS



U.S. Department of Education
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FREQUENTLY ASKED QUESTIONS ON THE RACE TO THE TOP ASSESSMENT PROGRAM AND INTELLECTUAL PROPERTY RIGHTS

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Introduction

This guidance revises and supersedes prior guidance that the Department issued on February 3, 2012. In this revision, we have modified the 2012 guidance to add the following questions: 3, 4, 5, 8, 10, and 11. The purpose of this document is to provide information about the Race to the Top Assessment program grantees' requirements related to intellectual property rights. The 2010 notice inviting applications (NIA) for the Race to the Top Assessment Program (75 FR 18171, 18175 (April 9, 2010)) included the following program requirement:

Unless otherwise protected by law or agreement as proprietary information, make any assessment content (i.e., assessments and assessment items) developed with funds from this grant category freely available to states, technology platform providers, and others that request it for purposes of administering assessments, provided they comply with consortium or state requirements for test or item security.

Please note that the guidance in this document is not legal advice regarding your intellectual property issues. Please consult with your legal counsel prior to using this guidance to ensure that it is appropriate to your particular situation.

This guidance is issued by the Office of the Deputy Secretary, Implementation and Support Unit, and it provides the U.S. Department of Education's interpretation of various statutory provisions and does not impose any requirements beyond those included in the American Recovery and Reinvestment Act of 2009 (ARRA), the Race to the Top Assessment program NIA, and other applicable laws and regulations. In addition, it does not create or confer any rights for or on any person.

Additional program guidance is provided on the Race to the Top Assessment program Web site at www.ed.gov/programs/racetothetop-assessment. If you have any questions or comments on this document, please e-mail racetothetop.assessment@ed.gov, call (202) 453-7246, or write to us at the following address: U.S. Department of Education, Race to the Top Assessment Program, 400 Maryland Avenue, SW, Room 7W104, Washington, DC 20202.

1. What intellectual property issues should a consortium consider when procuring products with Race to the Top Assessment funds?

Each consortium should be cognizant of intellectual property ownership issues when negotiating and executing agreements with contractors. The owner of a copyrighted work has the exclusive right to sell, distribute, reproduce, and display the work and to produce derivative works (except for the Federal government's license for those works developed or purchased with Federal grant funds, as discussed in question 2). Absent an agreement, the contractors that produce works for a consortium will retain copyright ownership in those works. Therefore, if the consortium wants to retain any of the aforementioned

usage rights in procured works from contractors, the consortium should make sure there is appropriate contract language that grants the consortium those usage rights.

The consortium can include language in a contract that will *transfer ownership* of copyrighted works created by the contractor. In many instances, contractors will be hesitant to transfer ownership in works they create. The consortium could also include language that will grant the consortium a *license* to use the works developed under an agreement. The consortium should consider what rights of use are important in negotiating and tailoring licensing language.

The consortium should consult with its legal counsel to ensure that agreements with contractors grant the consortium the rights it wishes to retain in the works produced with Race to the Top Assessment (RTTA) funds.

- 2. What are the Department’s expectations related to the grant’s Program Requirement 6 from the Notice Inviting Applications (NIA): “Unless otherwise protected by law or agreement as proprietary information, make any assessment content (i.e., assessments and assessment items) developed with funds from this grant category freely available to states, technology platform providers, and others that request it for purposes of administering assessments, provided they comply with consortium or state requirements for test or item security”?**

The Department expects that the consortium will establish rules and procedures to protect the security of assessments and assessment items. Interested parties (such as states and technology platform providers) that agree to abide by the consortium’s rules must be granted access to those materials developed with grant funds.

Consistent with 34 CFR 80.34, the Department reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for Federal government purposes, the copyright in any work developed under a grant (or contract under a grant) in this program, and any rights of copyright to which a grantee or contractor purchases ownership with grant support.

- 3. What is the intent of the phrase in Program Requirement 6: “Unless otherwise protected by law or agreement as proprietary information”?**

Proprietary information is sensitive information owned by a company that gives that company a competitive advantage. In short, it is an asset. Proprietary information can be protected by law or through agreements such as confidentiality and non-disclosure agreements. The Department encourages the consortia and their prospective contractors to be as clear as possible about what information is proprietary or has been made confidential through prior agreements. If materials provided by consortia and its contractors are ineffectual because the consortia and its contractors restricted sharing portions of developed materials for the protection of proprietary information, the Department may utilize its license stipulated in 34 CFR 80.34 to make any materials

developed with Race To The Top Assessment (RTTA) funds available to appropriate parties.

4. Can a grantee protect as proprietary information the content developed during the grant period with Department funds?

No. To the maximum extent practicable, the Department expects that grantees will make all content developed with funds from this grant category available, provided they comply with consortium or state requirements for test or item security. Protecting as proprietary the content developed specifically for this program with Federal grant funds is not consistent with the intent of this requirement. As noted in the response to question two, the Department reserves a royalty-free, nonexclusive, and irrevocable license per 34 CFR 80.34 to reproduce, publish, or otherwise use, and to authorize others to use, for Federal government purposes: the copyright in any work developed under a grant (or contract under a grant) in this program; and any rights of copyright to which a grantee or contractor purchases ownership with grant support.

As noted in question six, this would not preclude the grantee and the contractor from establishing agreements to permit either the grantee or the contractor from developing derivative works.

5. Can a grantee protect as proprietary information content developed before the grant period with non-Federal funds?

Yes. The Department acknowledges that some content developed with funding from this program may rely on, or build upon, previously developed content that is protected as proprietary information by law or a pre-existing agreement. In such instances, the Department cannot require changes to prior existing laws or contracts.

For example, the consortium is required to secure a license for any reading passages or other material (e.g., videos, audio clips, etc.) created by other parties that are utilized in the assessment system. The consortium is not required to provide the licenses necessary to utilize such copyrighted material to others who may request the consortium's assessment content. It is the responsibility of the requesting party to seek permission to reproduce the copyrighted material.

The Department notes, however, that the consortium should include in its sustainability plan how it will make copyrighted material available to member states that intend to administer the consortium's assessment system. This plan should account for the possibility that additional states not currently part of the consortium may later join the consortium.

6. Can the consortium or contractors make derivative works from products produced with RTTA grant funds?

A derivative work is a work based on or that builds upon a previously created, copyrighted work. Neither Program Requirement 6 nor 34 CFR 80.34 prevent contractors or the consortium from making derivatives of products they own that are developed with RTTA funds.

Through an agreement, the consortium and contractor should outline each party's copyright interests (including the ability to create derivatives) in developed works. Absent any applicable agreement or contract, the right to make derivative works remains with the original author of the copyrighted work.

If the consortium or its contractors, using their own funds, create derivatives of works created with RTTA funds during or after the grant period, neither Program Requirement 6 nor 34 CFR 80.34 will apply to the derivative works. Program Requirement 6 only applies to the RTTA grant; 34 CFR 80.34 only applies to works funded with U.S. Department of Education grant funds.

7. What should the consortium do to comply with the Department's intellectual property rights in RTTA-funded works (*i.e.*, can the Department provide sample language for use in contracts for the consortium to consider?)

There are two requirements that the consortium must consider when entering into agreements with contractors:

- a. As noted in question two, under 34 CFR 80.34, as well as Program Requirement 6, the Department reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for Federal government purposes, the copyright in any work developed under a grant (or contract under a grant) in this program, and any rights of copyright to which a grantee or contractor purchases ownership with grant support. The Department encourages the consortium to include a reference to the Department's license in agreements with contractors. The following sample notification clause is provided to help the consortium with its respective procurement plans. The consortium should consult with its legal counsel prior to any use of the language provided below.

“Any contract with a content developer under the Race to the Top Assessment grant is subject to a license held by the United States Department of Education (the “Department”). Consistent with 34 CFR 80.34, [CONTENT PROVIDER] acknowledges that the Department reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for Federal government purposes, the copyright in any work developed under this Agreement, and any rights of copyright to which a grantee or contractor purchases ownership or license with grant support.

Pursuant to the Cooperative Agreement between [CONSORTIUM] and the Department effective as of [DATE], [CONTENT PROVIDER] acknowledges that it must make any assessment content (i.e., assessments and assessment items) developed under this Agreement freely available to states, technology platform providers, and others that request said content for purposes of administering assessments. [CONTENT PROVIDER] must also comply with the [CONSORTIUM]'s requirements for test or item security. [CONTENT PROVIDER] will not be required to make any assessment content available to other parties if the assessment content is protected by law or agreement as proprietary information.

The Department also may ask [CONTENT PROVIDER] to make assessment content developed under this Agreement freely available online, unless said content is protected by law or agreement as proprietary information.

Any content developed by [CONTENT PROVIDER] prior to the development of work under this Agreement is not subject to the Department's license. However, any prior content merged with content developed under this Agreement is subject to the Department's license. Furthermore, any pre-existing work purchased outright or licensed is subject to the Department's license articulated in 34 CFR 80.34."

- b. Under 34 CFR 75.620(b), the consortium must include the following statement in publications developed with RTTA funds:

"The contents of this (*insert type of publication; e.g., book, report, film*) were developed under a grant from the Department of Education. However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government."

8. Is the consortium responsible for providing a license for commonly available proprietary materials that may be used in the assessment system (e.g., software licenses for commonly used software like Microsoft Office or Oracle Java)?

No. The Department understands that it is likely that, in the course of developing its assessment system, a consortium may rely on specific software as a component of a larger system (e.g., a vendor might use Oracle's Java Platform as a component in writing and delivering assessment items). In such cases, it is common for a state educational agency to receive a license to use that software that is valid for the life of the contract between the state and the vendor(s) developing and administering the assessment system.

The intent of Program Requirement 6 is that interested parties (such as states and technology platform providers) be granted access to materials developed with RTTA grant funds, provided that they agree to comply with consortium or state requirements for test or item security. The Department does not expect the consortium to be responsible for providing a license to those interested parties for all commonly available software

(e.g., Oracle’s Java Platform, Microsoft Office, etc.) that may be necessary to administer the assessments. Additionally, it is not necessary for the consortium to specify in contracts that commonly available third-party software is proprietary.

The Department encourages the consortium to consider the impact on sustainability of its assessment system if its contractors are using proprietary software that is not commonly available. Program Requirement 5 states, “To the extent that technology is used, maximize the interoperability of assessments across technology platforms and the ability for states to switch their assessments from one technology platform to another.” A contractor that uses proprietary software that is not commonly available may hinder the consortium’s ability to maximize the interoperability of assessments.

Any references made to third-party companies, products, and services are for illustrative purposes only and are not in any manner endorsements made by the Department.

9. What should the consortium consider regarding ownership of procured products once the grant period has expired?

Each consortium should consider what copyright interests it would like to purchase as part of a contract, and specifically determine which party or parties within the consortium will own purchased copyright interests. With copyright ownership, the consortium may reproduce, distribute, and otherwise utilize the work in any manner, including the right to transfer copyright interests as it chooses.

It is each consortium’s responsibility to determine how to manage the ownership of copyrighted works procured with RTTA funds. The consortium is encouraged to develop a plan for ensuring the sustainability of its assessment system, including for the materials developed during the grant period.

That plan should include an agreement or policy that determines which party or parties within the consortium own the copyright interests in, or have a license to use, intellectual property procured with grant funds. For example, a consortium may decide to execute an agreement amongst its members stating that all intellectual property procured with RTTA funds shall be jointly owned by the consortium’s members.

10. What are the Department’s expectations for the consortium making assessment content “freely available”?

As required by the absolute priority of the Race to the Top Assessment notice inviting applications (75 FR 18171 (April 9, 2010)), the consortium is developing a comprehensive assessment system that will provide results to inform determinations of school effectiveness for purposes of accountability under Title I of the Elementary and Secondary Education Act; determinations of individual principal and teacher effectiveness for purposes of evaluation; determinations of principal and teacher professional development and support needs; and teaching, learning, and program

improvement. Maintaining the validity and reliability of the assessment results for these purposes is fundamental to the system.

As a result, the consortium must establish test or item security policies that protect the integrity of the assessment system, ensure the validity and reliability of the data, and ensure the comparability of the results across the member states. Those states or entities that comply with the consortium's or state's test or item security policies should be granted access to the assessment content developed during the grant period with Federal funds. The consortium may incur costs making content available; therefore, as a result, the Department understands that the consortium may consider charging a reasonable amount to cover the costs of making that content available to the requestor.

The Department expects that any state or entity wishing to administer the consortium's assessment system (either the summative assessments or the entire assessment system) without modification after the grant period would be permitted to do so, provided they comply with the consortium's requirements for administering the assessments. The consortium should not place an additional burden or cost on that state or entity as compared to any other state or entity administering the consortium's assessment system. That is, the cost to administer, score, report, and otherwise maintain the assessment system should not differ based on whether the recipient state or entity was part of the consortium during the grant period.

11. Does the Department have any guidance for the consortia regarding how to define “consortium or state requirements for test or item security”?

Test or item security is a larger issue than simply the intellectual property rights of assessment content. The consortium's test security policy should include information about test administration conditions, what constitutes a breach in test security, and actions the consortium and member states may take in response to allegations of test security violations and confirmed test security violations. The test security policy should also include a plan for making assessment content freely available. States typically have policies regarding what, when, and how assessment content can be shared publicly. The consortium should establish similar policies to which all member states agree, including how external requests for materials will be reviewed.

12. Does the requirement to make assessments and items freely available apply to items or assessments developed after the grant period has ended? Does the Department's license codified in 34 CFR 80.34 apply to items developed after the grant period?

Program Requirement 6 is specific to the RTTA program and applies only to items funded in whole or in part by the RTTA program during the grant period. However, in accordance with 34 CFR 80.34, the Department's license will perpetually apply to all works developed with Department grant funds.

For example, if, after the grant period ends, a consortium or its member states create items for the assessment system using other Department funds (such as the funds

provided for state assessments under section 6111 of the Elementary and Secondary Education Act), Program Requirement 6 would not apply, but the Department would be able reproduce, publish, or otherwise use, and to authorize others to use these items for Federal government purposes pursuant to 34 CFR 80.34.

13. Does the Department’s license articulated in 34 CFR 80.34 and Program Requirement 6 apply to pre-existing content utilized by the consortium or its contractors to create finalized work products?

The Department issued the RTTA grant to provide funding to consortia to develop an operational assessment system. Section 34 CFR 80.34 grants the Department a license for works *developed* with Department grant funds. The final operational assessment system provided by the consortium and its contractors would be developed or delivered with RTTA funds. Therefore, the Department would have the ability to reproduce, publish, or otherwise use, and to authorize others to use, the final operational assessment system developed with RTTA grant funds, including any modifications made with grant funds to pre-existing work.

Even if a final system includes pre-existing material, the Department would have the ability to use this final product under its license codified in 34 CFR 80.34. However, the Department would not be able to use the pre-existing material independently without permission of the copyright owner.

Pursuant to Program Requirement 6, the Department similarly expects consortia to make RTTA-funded assessments and items, including the pre-existing material within, freely available to the appropriate parties.