

## **GUIDELINES FOR THE COMMONWEALTH'S DEVELOPMENT OPPORTUNITY FUND PROGRAM**

### **Purpose:**

The Commonwealth's Development Opportunity Fund (COF) provides either grants or loans to localities to assist in the creation of new jobs and capital investment in accordance with criteria established by legislation. The statutory provisions for the COF can be found at Section 2.2-115 of the Code of Virginia of 1950, as amended (the COF Act).

### **Guiding Principles:**

General Provisions: COF grants are made at the discretion of the Governor with the expectation that grants awarded to a locality or authority will result in a favorable decision for Virginia. Typically, COF grants are made upon the recommendation of the Virginia Economic Development Partnership (VEDP) to the Governor.

Although the COF may be used to make loans, the practice has been to use the COF to make grants.

COF grants are intended to be performance grants and are not intended to serve as front-end funding or financing for an economic development project.

Incentive Philosophy: These factors, among others, will be considered by VEDP when determining whether to recommend discretionary incentives, including COF grants:

- alignment with strategic sectors and state/local strategies
- potential community impact
- maximization of community wealth
- diversification of the job base and the tax base
- solving a competitive need
- establishing a competitive advantage
- leveraging other state resources

- advancement of the quality of life

Grant Amounts: In determining grant amounts, the following criteria will be considered: the return on investment to the Commonwealth, new jobs, wage levels, overall employment, capital investment, area and regional unemployment, poverty and fiscal stress, the locality's interest in the project, and industry or company growth potential.

The maximum amount of a COF grant through June 30, 2017 is \$1,500,000. In very unique circumstances, this limit may be exceeded for projects that are determined to be of statewide or regional interest.

Grants may only be made from current appropriations and available funds and may not be committed from anticipated future appropriations, except to the extent that VEDP may be able to tap into future appropriations, as permitted by the state budget, under certain circumstances.

Multiple Grants: Localities may receive more than one COF grant during a fiscal year.

Grants may be made for more than one project for a single company, but the projects must clearly represent separate investments for separate projects.

Basic Sector Projects Only: Grants will only be awarded for basic sector projects—i.e. projects for companies or functions that provide new or additional income into Virginia and add to the gross state product, by providing goods or services at least one-half of which will be sold outside of the Commonwealth or will be paid for with funds from outside of the Commonwealth.

Competitive Projects Only: The COF is the Commonwealth's premier tool for encouraging a project to come to or grow in the Commonwealth, rather than another state or country. Accordingly, there must be an active and realistic competition between Virginia and another state or country for attracting the project. Grants are made with the expectation that the award of the grants will result in a favorable decision for Virginia.

*First Announcement by Governor:* Grants will not be made for projects that have been publicly announced prior to the Governor's approval and public announcement of a grant award.

Upon approval of a COF grant or loan, neither the locality nor the company shall announce or confirm the proposed project without coordination with VEDP. The new jobs and capital investment targets in the performance agreement will be used in the press release when the public announcement is made. If the targets are not used for the public announcement of the project, or if the public announcement is made by anyone other than the Governor, the grant award is subject to being withdrawn.

*Allocations and Considerations Required by Statute or Budget:* Beginning with the five fiscal years from fiscal year 2006-2007 through fiscal year 2010-2011, and for every five fiscal years' period thereafter, in general, no less than one-third of the moneys appropriated to the COF in every such five-year period may be awarded to counties and cities having an annual average unemployment rate that is greater than the final statewide average unemployment rate for the calendar year that immediately precedes the calendar year of the award. If, however, the one-third requirement will not be met because economic development prospects in such counties and cities are unable to fulfill the applicable statutory minimum private investment and new jobs requirements, then any funds remaining in the COF at the end of the five-year period that would have otherwise been awarded to such counties and cities shall be made available for awards in the next five fiscal years' period.

The Commonwealth's Budget directs VEDP to give consideration to projects that (1) are in areas of high unemployment; (2) link commercial development along existing transportation/transit corridors within regions; and (3) are located near existing public infrastructure.

In assessing the amount of a COF grant, the measure for Fiscal Stress published by the Commission on Local Government for the applicable locality will be one determining factor. Geographic diversity will be another determining factor.

*Policy Regarding Relocations:* It is the policy of the Commonwealth that COF proceeds will not be used for any economic development project in

which a business relocates or expands its operations in one or more Virginia localities and simultaneously closes its operations or substantially reduces the number of its employees in another Virginia locality. The Secretary of Commerce and Trade will enforce this policy. Exceptions to this policy may be made, but will require that the Secretary provide written notice to the Chairmen of the Senate Finance and House Appropriations Committees, which notice will include a justification for any such exception. Further, the locality receiving the jobs will provide notification and a justification to the locality from which the jobs will be lost.

*Policy Regarding Downsizing:* If the company has existing operations in Virginia and has closed, downsized, consolidated, or laid off employees within the past 30 months prior to the application date, there may be a bias toward not approving a COF application. The company will be offered an opportunity to explain such actions and to provide assurances regarding the expected new jobs and capital investment.

### **Statutory Eligibility:**

The COF has several levels of qualification based on such measures as a locality's unemployment rate and poverty rate.

- **General Eligibility Thresholds:**
  - 50 new jobs / \$5 million capital investment; or
  - 25 new jobs / \$100 million capital investment
  - The average annual wage for the new jobs must be at least equal to the prevailing average annual wage in the locality, excluding fringe benefits
  - If the average annual wage is twice the prevailing average annual wage, the Governor may reduce the new jobs threshold to as low as 25
- **Eligibility Thresholds in Localities with Above-Average Unemployment or Above-Average Poverty:**
  - For a locality with an unemployment rate for the most recent calendar year for which such data is available above the average statewide unemployment rate for that calendar year or with a poverty rate for the most recent calendar year for which

such data is available above the statewide average poverty rate for that calendar year

- 25 new jobs / \$2.5 million capital investment
  - Jobs may pay below the prevailing average annual wage in the locality, but must pay at least 85% of such prevailing average annual wage
  - If the average annual wage of the new jobs is less than 85% of the prevailing average annual wage, but the customary employee benefits are offered, the Governor may still award a grant or loan, but the Secretary of Commerce and Trade must furnish a written explanation to the Chairmen of the Senate Finance and House Appropriations Committees setting forth the urgent need to provide a grant or loan to that project
- Eligibility Thresholds in Localities with Above-Average Unemployment **and** Above-Average Poverty:
    - For a locality with an unemployment rate for the most recent calendar year for which such data is available above the average statewide unemployment rate for that calendar year **and** with a poverty rate for the most recent calendar year for which such data is available above the statewide average poverty rate for that calendar year
    - 15 new jobs / \$1.5 million capital investment
    - Jobs may pay below the prevailing average annual wage in the locality, but must pay at least 85% of such prevailing average annual wage
    - If the average annual wage of the new jobs is less than 85% of the prevailing average annual wage, but the customary employee benefits are offered, the Governor may still award a grant or loan, but the Secretary of Commerce and Trade must furnish a written explanation to the Chairmen of the Senate Finance and House Appropriations Committees setting forth the urgent need to provide a grant or loan to that project

Data from the Census Bureau's Model-based Small Area Income & Poverty Estimates (SAIPE) for School Districts, Counties, and States is the primary source for annual poverty rates.

(<http://www.census.gov/did/www/saipe/index.html>).

## **Provisions Regarding New Jobs:**

Definition of New Job: VEDP expects to use a definition of “new job” that substantially reads as follows:

“New job” means new permanent full-time employment of an indefinite duration at the company’s facility in the locality, for which the standard fringe benefits are provided by the company for the employee, and for which the company pays an average annual wage of at least \$[insert the company’s projected average annual wage]. Each new job must require a minimum of either (i) 35 hours of an employee’s time per week for the entire normal year of the company’s operations, which “normal year” must consist of at least 48 weeks, or (ii) 1,680 hours per year. Seasonal or temporary positions, positions created when a job function is shifted from an existing location in the Commonwealth, and positions with construction contractors, vendors, suppliers and similar multiplier or spin-off jobs shall not qualify as new jobs. Net new jobs in the Commonwealth for contractors or employees of contractors who are located in the Commonwealth and provide dedicated full-time service to the Company may count as New Jobs, even though the Company is not directly paying the wages or providing the fringe benefits, if the other conditions set forth in this paragraph have been satisfied.

Definition of Maintain: Generally, the new jobs must be created and maintained through the performance period. Accordingly, any layoffs instituted by the company through the performance period will be taken into account in determining compliance with the company’s new job requirement. VEDP expects to use a definition of “Maintain” that substantially reads as follows:

“Maintain” means that the New Jobs will continue without interruption from the date of creation through the Performance Date. Positions for the New Jobs will be treated as Maintained during periods in which such positions are not filled due to (i) temporary reductions in the COF grantee’s employment levels (so long as there is active recruitment for open positions), (ii) strikes, and (iii) other temporary work stoppages.

*Existing Jobs:* If there are existing jobs at the company's facility (or at a contractor's facility, if applicable), it is expected that the COF grant performance agreement will state the number of existing jobs and will require that the new jobs be in addition to the existing jobs.

In projects that involve job preservation, the number of "jobs saved" will be used to help determine the amount of the grant; however, the project must still meet the appropriate minimum new job *creation* threshold listed above.

*Contractor Job Information:* If the company wishes to count the new jobs created by contractors in meeting its new jobs target, as described in the last sentence of the definition of "new job," the company will be responsible for gathering and disseminating to the locality and VEDP information regarding those jobs, including whether such jobs are "net new jobs" in the Commonwealth.

*Hiring of Virginia Residents:* In the performance agreement for the COF grant, the company will be strongly encouraged to ensure that at least thirty percent (30%) of the new jobs are offered to "Residents" of the Commonwealth, as defined in Virginia Code Section 58.1-302.

*Cross-Border Projects:* For cross-border projects for which a significant percentage of the employees are current Virginia residents, the definition of "new jobs" is likely to be adjusted to count as "new jobs" only those positions that are net new jobs in the Commonwealth held by Virginia residents. Such a definition will exclude the number of current Virginia resident employees and the number of employees that are residents of border states.

*Verification of New Jobs:* Companies will be asked to report the number of jobs created and retained through the performance period, and the average annual wage for those jobs. Companies should understand that the information provided by them will be verified by VEDP with the Virginia Employment Commission. Companies may be requested to provide copies to VEDP of the employer's quarterly reports provided to the Virginia Employment Commission.

## **Provisions Regarding Capital Investment:**

Definition of Capital Investment: “Capital investment” is used in these Guidelines to mean “private investment” under the COF Act.

VEDP expects to use a definition of “*capital investment*” that substantially reads as follows:

“Capital investment” means a capital expenditure by or on behalf of the company on or after \_\_\_\_\_, 20\_\_ in taxable real property, taxable tangible personal property, or both, at the company’s facility in the locality. [Generally, this date will be around the announcement date.]

Capital expenditures funded with the proceeds of a COF grant or other contributions by governmental entities shall not count toward a company’s required “capital investment.”

Used Equipment Moved to Project: Generally, VEDP will not count as “capital investment” the value of used equipment transferred by the company to the project site. VEDP may, in its discretion (which it expects to exercise only in very unusual circumstances), allow such equipment to count toward qualifying investment, if it is being moved to the Commonwealth from outside of the Commonwealth, and it does not represent more than half of the qualifying capital investment. The community’s assessed value of the used equipment to which the local tax rate will be applied will be considered in determining qualifying capital investment.

Operating Leases / Expenses: VEDP may, in its discretion, determine that the value of machinery and equipment leased under an operating lease will qualify as a capital investment.

VEDP may, in its discretion, determine that the value of the construction or improvement of real property leased under an operating lease will qualify as a capital investment, but is likely to do so only in circumstances in which (1) the operating lease is for at least the longer of five years or twice the period of time until VEDP has estimated that the Commonwealth will “break-even” on the project, taking into account all incentives offered to the company by the Commonwealth, (2) the real property would not be

constructed or improved “but for” the company’s interest in leasing some or all of the facility, and (3) if for an improvement project, the improvements will significantly increase the taxable value of the property. Only that portion of the construction or improvement costs related to the portion of the facility to be leased to the company may qualify.

Capital investment generally will not include operating expenses, except operating leases to the limited extent noted above.

Capital Leases: Capital investment may include the value of real or personal property leased under a capital lease.

Exclusion for the Cost of Land and Existing Buildings: The cost of the acquisition of land and existing buildings will not count toward the required capital investment thresholds, unless the land and existing buildings are being purchased from a governmental entity and are being returned to the tax rolls.

Verification of Capital Investment: Companies will be asked to report the amount and type of capital investment made through the performance period, by broad categories (such as: land, land improvement or machinery, fixtures and equipment). Companies should understand that the information provided by them will be verified by VEDP with the locality. The Performance Agreement is likely to contain language authorizing VEDP to access the company’s tax records at the locality, that reads substantially as follows:

The Company hereby authorizes the Locality, including the [Offices of the Commissioner of the Revenue and the Treasurer] for the Locality, to release to VEDP the Company’s real estate tax, business personal property tax and machinery and tools tax information. Such information shall be marked and considered confidential and proprietary and shall be used by VEDP solely for verifying satisfaction of the Capital Investment Target. If the Locality, [the Office of the Commissioner of the Revenue or the Office of the Treasurer] should require additional documentation or consents from the Company to access such information, the Company shall promptly provide, at the Company’s expense, such additional

documentation or consents as the Locality, the Authority or VEDP may request.

### **Local Matches:**

Qualifying Local Matches: Localities must at least match dollar-for-dollar with local funds the amount requested from the COF. Previously invested local funds, grants of moneys from other government sources (except as noted below with respect to the Tobacco Region Opportunity Fund), and contributions from private interests which benefit from the project's location may not be counted as part of the local match. A local match may be funded by an in-kind contribution from the locality for the direct benefit of the grantee, such as infrastructure development, fee waivers, or free or reduced-price land or buildings. In very unique circumstances, the Governor may waive or reduce the requirement for a local match for projects that the Governor has determined are of statewide or regional interest. Criteria such as vacancy and unemployment or poverty rates in the immediate area of the proposed site may be considered in the decision-making process.

Local Enterprise Zone incentives may be counted toward the local match where the locality makes actual expenditures after the project is announced to benefit the project.

Grants for a project made to the locality from the Tobacco Region Opportunity Fund may be used as up to one-half of the local match for the COF grant.

Date by Which Local Matches Must be Provided: Local matches generally must be made by the performance date by which the company is obligated to complete its capital investment and job creation and maintenance. Generally, this period is three years. The Performance Agreement is likely to contain the following language that will require a locality to make up any shortfall in the local match that remains at the performance date:

If, by the [Initial] Performance Date, the \_\_\_\_\_ funds disbursed or committed to be disbursed by the Locality to the Company total less than the \$\_\_\_\_\_ COF Grant local match requirement, the Locality, subject to appropriation, will

make an additional grant to the Company of the difference at the [Initial] Performance Date, so long as the Company has met its Targets.

### **Use of COF Proceeds:**

COF Proceeds may be used for public and private utility extension or capacity development on and off site; public and private installation, extension, or capacity development of high-speed or broadband Internet access, whether on or off site; road, rail, or other transportation access costs beyond the funding capability of existing programs; site acquisition; grading, drainage, paving, and any other activity required to prepare a site for construction; construction of publicly or privately owned buildings or build-out of publicly or privately owned buildings; training; or grants or loans to an industrial development authority, housing and redevelopment authority, or other political subdivision for purposes directly relating to any of the foregoing. In no case may COF proceeds be used, directly or indirectly, to pay or guarantee the payment for any rental, lease, license, or other contractual right to the use of any property.

### **Application Process:**

Two Documents: Applications should consist of two documents: (1) a community letter sent by the chief appointed official of any county, city, town or other applicable political subdivision to the President and Chief Executive Officer of VEDP and (2) a letter sent by the company to the President and Chief Executive Officer of VEDP.

Community Letter: It is expected that the letter from the community will use the following format and include the following information:

- A summary statement presenting the importance of the project to the community and why support from the COF is being sought;
- Amount requested;
- The expected use of the funds;

- Description of the project, including:
  - Company name and information (website, stock exchange ticker)
  - Type of operation (i.e. manufacturing, distribution, etc.)
  - Headquarters location
  - Virginia operations (if any exist)
  - What the company is planning to do in Virginia
  - Employment impact on current operations in Virginia
- Location of the project including the community, and its population, current unemployment and poverty rates and prevailing average annual wage;
- Details of capital investment, including but not limited to the value of property to be leased under a capital lease, or other investments of capital that add to the local tax revenues;
- Jobs anticipated to be created and maintained by the company's performance date (generally 3 years after the locality receives a grant payment), information on "jobs saved," average salary level and total yearly payroll of jobs created;
- Local and state financial participation, specifying new moneys to be allocated to the project and how those funds will be used:
- Description of other public funds that have been or will be expended for the project such as training or past public expenditures for road, utility extension or site development;
- If the project for which a COF grant is being requested involves the relocation of a business from one Virginia locality to another, the community applying for the grant must officially notify the community from which the business is moving. For such projects, a statement must be included in the COF application that this notification has taken place, and must also provide the reasons for the move and the out-of-state competition;
- If applicable, an acknowledgement that the COF grant proceeds will be disbursed in installments, as certain milestones are achieved; and

- Any other current or background information pertinent to the project that might assist the Governor in making an informed decision based on complete knowledge. Communities are obliged to disclose any information that could reflect negatively on the project.

Company Letter: It is expected that the letter from the company will use the following format and include the following information:

- An indication from the company that without support from the COF, there is a possibility that the project could be located outside of Virginia and that only one site in Virginia is under consideration for the project;
- An indication from the company of the number of new jobs expected to be created (and saved, if any) and maintained, payroll and salary levels and a statement confirming the company offers its employees a standard package of fringe benefits;
- An indication of the capital investment expected to be made by or on behalf of the company at the facility in the community by the performance date, which is generally 3 years after the expected receipt of the grant by the community, including an indication of the extent to which the company expects to make the capital investment through the use of operating or capital leases;
- An affirmation that the proposed project will not result in a closing, loss of jobs, consolidation, or change to any existing operations in Virginia for the next 12 months;
- If applicable, an acknowledgement that the COF grant proceeds will be disbursed in installments, as certain milestones are achieved;
- An acknowledgement that certain political contributions made by the company to the Governor or his campaign committee or political action committee will be reported to the Virginia Conflict of Interest and Ethics Advisory Council (see “Miscellaneous – *Political Contributions*” below); and

- An affirmation that the company has not closed, downsized, consolidated, or laid off employees at existing operations in Virginia within the past 12 months prior to the application date, or, if it has, additional assurances regarding the stability of the new jobs and capital investment.

Together with the letter from the company described above, the company is likely to be asked to provide three years of historical financial statements, covering the three years prior to the application, and three years of pro forma financial statements, covering the three years following the application. If the company has been in business less than three years, it may be asked to provide the historical financial statements that may be available. The company is also likely to be asked to provide satisfactory evidence of its ability to finance, implement and operate the project. VEDP may request additional financial information from the company.

*Due Diligence Review:* Each project for which a COF grant may be recommended will be subject to a due diligence review process.

*Basic Structure:*

- The VEDP Project Manager will get from the company the project parameters, and evidence of the company's financial viability and the company's ability to finance, implement and operate the project;
- The Project Review and Credit Committee ("PRACC") will review the project parameters and financial viability and the company's ability to finance, implement and operate the project (see below for the PRACC process);
- If approved by PRACC, a briefing memo, project information, and the Return on Investment analysis ("ROI") will be conveyed to the Secretary of Commerce and Trade ("SCT") for preliminary approval;
- A proposal will be delivered to the company outlining incentives and requirements; and
- If the proposal is acceptable to the company, the Governor will be asked to provide his final approval.

*PRACC Process:*

The PRACC team consists of the Chief Executive Officer, the Chief Operating Officer, the Vice President of Business Expansion, the Vice President of Business Attraction, the Vice President of Research, General Counsel, the Project Research Manager, the Senior Economist, and the Executive Director of the Virginia Small Business Financing Authority. PRACC will review all elements of the project, consider strategic, competitive, and financial implications, and evaluate the risk assessment and ROI analysis. PRACC will review these elements through the lens of VEDP's incentive philosophy, as described above in "Guiding Principles – *Incentive Philosophy*." For a COF, PRACC will approve any proposed conditions for the release of COF funds, including milestones, conditions or security, such as a standby letter of credit. PRACC will ensure that these milestones, conditions or security are instituted in alignment with other state and local partners.

PRACC will determine whether to seek the SCT's preliminary approval.

The findings of the risk assessment performed by the Senior Economist and the Executive Director of the Virginia Small Business Financing Authority will be documented in VEDP's Salesforce database and shared with local and regional partners.

### **Performance Agreement:**

*Performance Agreement Between Community and Company:* Since a COF grant is awarded to a community, the community is required to enter into a performance agreement with the company before it may receive the COF grant. This is to ensure that the company will meet the new job and capital investment levels as stated in its application and as agreed to. Neither VEDP nor the Commonwealth will be a party to the performance agreement. It is expected that the performance agreement will also have the community's industrial or economic development authority as a party.

The basic form of a performance agreement is attached to these Guidelines.

The performance agreement will set forth the capital investment and new jobs targets.

*Date from Which to Count Capital Investment and New Jobs:* For an expansion of an existing facility, the performance agreement will state the date or dates from which VEDP will start counting capital investment and new jobs. Generally, this date will be around the announcement date. It is not expected that this date will ever be earlier than the date that the company received an incentive proposal from VEDP.

*Performance Date:* The performance agreement will include an end-date by which the company will achieve the capital investment and new jobs targets (a “Performance Date”). Generally, the Performance Date will be the date 36 months after the date by which the community needs to request the COF check. Further, if the date by which the Commonwealth is expected to reach its “break-even point” as determined by a return-on-investment analysis prepared by VEDP, is later than the Performance Date, there will be another obligation of the company to maintain its new jobs through the break-even date.

If the company has not achieved at least 90% of its new jobs and capital investment targets by the Performance Date set forth in the performance agreement, the locality, in consultation with VEDP, may grant the company an extension of up to 15 months. The locality will notify VEDP of any such extension. Generally, the extension should be granted only in circumstances under which it is reasonable to believe that the company is likely to make significant progress toward meeting its performance targets by the extension date.

*Failure of Full Compliance:* The community will be held responsible for requesting any repayments as calculated by VEDP, and for returning the COF grant moneys repaid by the company to the Commonwealth if the performance agreement criteria are not met.

Generally, COF grants are broken into 50% for job creation and 50% for capital investment. **The company must meet the statutory minimums for both jobs and investment detailed in the “Statutory Eligibility” section or be subject to a 100% repayment.** If the minimum statutory thresholds are met, but the jobs and/or investment targets are not met up to 90% of their goal, then there will be a repayment in proportion to the underperformance for each respective component. If the Company meets at least 90% of its new jobs and capital investment targets by the

Performance Date, there will be no repayment, assuming that the statutory minimum requirements have been achieved.

The performance agreement will likely contain a provision that will require a 100% repayment if at any time the community or VEDP conclude that the company will be unable to meet its new jobs and capital investment targets by the Performance Date. Such a conclusion may be based on factors such as the bankruptcy of the company, the sale or liquidation of the company, or the cessation or substantial reduction of operations by the company in the community.

*Business Income Tax Information:* For VEDP to demonstrate the value of the COF program and other economic development incentives, it would be helpful for the company to share with VEDP the Virginia corporate income taxes paid by the company. VEDP has no access to this information, unless the company volunteers to provide it to VEDP. It is expected that each performance agreement will contain a provision that substantially reads as follows:

With each annual progress report, the company shall report to VEDP the amount paid by the company in the prior calendar year in Virginia corporate income tax [or, as applicable, shall provide to VEDP a copy of its Virginia income tax form filed with respect to its status as a pass-through entity.] VEDP has represented to the company that it considers such information to be confidential proprietary information that is exempt from public disclosure under the Virginia Freedom of Information Act and that such information will be used by VEDP solely in calculating aggregate return on invested capital analyses for purposes of gauging the overall effectiveness of economic development incentives.

*OAG Review:* Once VEDP, the locality and the company are comfortable with the language of the performance agreement, the performance agreement must be presented to the Office of the Attorney General for review as to proper legal form. The OAG will have up to seven days to provide written comments regarding the performance agreement.

*Deadline for Request of GOF Check:* The performance agreement will likely contain a date by which the community must request the COF check,

which date is likely to be 3 or 4 months after the Governor has announced that the project will be coming to Virginia. The performance agreement will likely provide that the performance agreement will be terminated if the check is not requested by that date. The community and the company would be welcome to reapply for another COF grant, using any new criteria in place at that time and subject to the availability of funds at that time. The form to be used by the community for requesting the check is available from VEDP.

Reporting / Follow-Up: The performance agreement will likely contain a provision requiring the company to provide an annual report on its progress toward its performance targets. In addition, the company should expect to receive periodic requests from VEDP or the locality for information regarding the company's progress.

### **Miscellaneous:**

Other Uses: If legislation from the Virginia General Assembly provides that moneys from the COF fund must be or may be directed to other uses, VEDP may cause the withdrawal of such moneys from the COF fund for those uses, regardless of whether such those uses may conflict with these Guidelines.

Federal Funds: If the Virginia General Assembly deposits federal funds into the COF fund, and if the expenditure of those federal funds would require compliance by the locality and/or the company with various federal legal requirements, those federal legal requirements will be deemed to be read into the performance agreement.

Assignment: The Company may not assign its rights or obligations under a COF performance agreement without the express written approval from VEDP and the community. VEDP will consider a reassignment of rights and obligations in the event that there is a transfer to a parent company, subsidiary or sister entity, there is no net effect on new job creation and capital investment, and the benefits accruing to the locality and the Commonwealth will remain substantially the same.

Change in Law: The COF provisions described in these guidelines reflect the COF provisions in the Virginia Code as of July 1, 2017. Changes

made by the General Assembly in the applicable provisions of the Virginia Code will be read into, and will be deemed to amend, these guidelines. As necessary, VEDP will provide the COF grantees with written notice of any such changes.

*Political Contributions:* For a company receiving a COF grant based upon an application made on or after July 1, 2016, there is a notification requirement for certain political contributions. For any political contributions, gifts or other items with a value greater than \$100 made by the company to the Governor or his political action committee or his campaign committee from the date of the application for the COF grant until one year after the COF grant is awarded, the Governor, or his political action committee or campaign committee must notify the Virginia Conflict of Interest and Ethics Advisory Council that such a contribution, gift or other item of value over \$100 has been received.

The performance agreement is likely to contain a provision that substantially reads as follows:

*Disclosure of Political Contributions:* The Company acknowledges that the name of the Company will be shared by VEDP with the Governor of Virginia, and any campaign committee or political action committee associated with the Governor. The Company acknowledges that within 18 months of the date of this Performance Agreement, the Governor, his campaign committee, and his political action committee will submit to the Virginia Conflict of Interest and Ethics Advisory Council a report listing any contribution, gift, or other item with a value greater than \$100 provided by the Company to the Governor, his campaign committee, or his political action committee, respectively, during the period from the date of the Company's application for the COF Grant through the one-year period immediately after the date of this Performance Agreement.

*Confidentiality:* Each COF grantee should be aware that information regarding the grantee, including its application materials and its level of achievement of its performance goals under the performance agreement, will be shared by VEDP with the Virginia Small Business Financing Authority and the Joint Legislative Audit and Review Commission.

## COMMONWEALTH'S DEVELOPMENT OPPORTUNITY FUND

### PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** made and entered this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and among the \_\_\_\_\_ of \_\_\_\_\_, **VIRGINIA** (the "Locality") a political subdivision of the Commonwealth of Virginia (the "Commonwealth"), and \_\_\_\_\_ (the "Company"), a \_\_\_\_\_ [corporation] [authorized to transact business in the Commonwealth], and the **[INDUSTRIAL / ECONOMIC] DEVELOPMENT AUTHORITY OF \_\_\_\_\_** (the "Authority"), a political subdivision of the Commonwealth. [CAN DELETE THE LOCALITY'S AUTHORITY AS A PARTY, IF SO DESIRED BY THE LOCALITY, THEN MAKE APPROPRIATE CHANGES THROUGHOUT]

WITNESSETH:

WHEREAS, the Locality has been awarded a grant of and expects to receive \$\_\_\_\_\_ from the Commonwealth's Development Opportunity Fund (a "COF Grant") through the Virginia Economic Development Partnership Authority ("VEDP") for the purpose of inducing the Company to [purchase / construct / expand / equip / improve] and operate a [manufacturing] [warehouse and distribution] [office and headquarters] facility in the Locality (the "Facility"), thereby making a significant Capital Investment, and creating and Maintaining a significant number of New Jobs, as such capitalized terms are hereinafter defined;

WHEREAS, the Locality is willing to provide the funds to the Authority with the expectation that the Authority will provide the funds to or for the use of the Company, provided that the Company promises to meet certain criteria relating to Capital Investment and New Jobs;

WHEREAS, the Locality, the Authority and the Company desire to set forth their understanding and agreement as to the payout of the COF Grant, the use of the COF Grant proceeds, the obligations of the Company regarding Capital Investment and New Jobs, and the repayment by the Company of all or part of the COF Grant under certain circumstances;

WHEREAS, the [purchase / construction / expansion / equipping / improvement] and operation of the Facility will entail a capital expenditure by or on behalf of the Company of approximately \$\_\_\_\_\_, of which approximately \$\_\_\_\_\_ will be invested in machinery and equipment, approximately \$\_\_\_\_\_ will be invested in the purchase of land, approximately \$\_\_\_\_\_ will be invested in the [purchase of an existing] [construction of a new] building and approximately \$\_\_\_\_\_ will be invested in the up-fit of the building;

WHEREAS, the [purchase / construction / expansion / equipping / improvement] and operation of the Facility will further entail the creation and Maintenance of \_\_\_\_ New Jobs at the Facility; and

WHEREAS, the stimulation of the additional tax revenue and economic activity to be generated by the Capital Investment and New Jobs constitutes a valid public purpose for the expenditure of public funds and is the animating purpose for the COF Grant:

NOW, THEREFORE, in consideration of the foregoing, the mutual benefits, promises and undertakings of the parties to this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties covenant and agree as follows.

**Section 1. Definitions.**

For the purposes of this Agreement, the following terms shall have the following definitions:

“Capital Investment” means a capital expenditure by or on behalf of the Company in taxable real property, taxable tangible personal property, or both, at the Facility. [The Capital Investment must be in addition to the capital improvements at the Facility as of \_\_\_\_\_, 20\_\_]. [MODIFY FOR CAPITAL LEASE OF REAL ESTATE OR OPERATING LEASE OF EQUIPMENT BY INSERTING, AS APPROPRIATE: A capital expenditure related to a leasehold interest in real property will be considered to be made “on behalf of the Company” if a lease between a developer and the Company is a capital lease, or is an operating lease having a term of at least ten years, and the real property would not have been constructed or improved but for the Company’s interest in leasing some or all of the real property. Only the capital expenditures allocated to the portion of the real property to be leased by the Company will count as “Capital Investment.” The purchase or lease of furniture, fixtures, machinery and equipment, including under an operating lease, and expected building up-fit and tenant improvements by or on behalf of the Company will qualify as Capital Investment.]

“Maintain” means that the New Jobs will continue without interruption from the date of creation through the [Subsequent] Performance Date. Positions for the New Jobs will be treated as Maintained during periods in which such positions are not filled due to (i) temporary reductions in the Company’s employment levels (so long as there is active recruitment for open positions), (ii) strikes and (iii) other temporary work stoppages.

“New Job” means new permanent full-time employment of an indefinite duration at the Facility for which the standard fringe benefits are provided by the Company for the employee, and for which the Company pays an average annual wage of at least \$\_\_\_\_\_. Each New Job must require a minimum of either (i) 35 hours of an employee’s time per week for the entire normal year of the Company’s operations, which “normal year” must consist of at least 48 weeks, or (ii) 1,680 hours per year. Seasonal or temporary positions, positions created when a job function is shifted from an existing location in the Commonwealth, and positions with construction contractors, vendors, suppliers and similar multiplier or spin-off jobs shall not qualify as New Jobs. [The New Jobs must be in addition to the \_\_\_ full-time jobs at the Facility as of \_\_\_\_\_, 20\_\_.] [IF APPLICABLE: Net new jobs in the Commonwealth for contractors or employees of contractors who provide dedicated full-time service to the Company may count

as New Jobs, even though the Company is not directly paying the wages or providing the fringe benefits, if the other conditions set forth in this paragraph have been satisfied.]

“[Initial] Performance Date” means \_\_\_\_\_, 20\_\_\_. If the Locality, in consultation with the Authority and VEDP, deems that good faith and reasonable efforts have been made and are being made by the Company to achieve the Targets, the Locality may agree to extend the [Initial] Performance Date by up to 15 months. If the [Initial] Performance Date is extended, the Locality shall send written notice of the extension to the Authority, the Company and VEDP and the date to which the [Initial] Performance Date has been extended shall be the “[Initial] Performance Date” for the purposes of this Agreement. [GENERALLY, THIS PERFORMANCE DATE WILL BE 3 YEARS AFTER THE DATE GIVEN IN SECTION 3 AS THE DATE BY WHICH THE COF CHECK NEEDS TO BE REQUESTED]

[“Standby Letter of Credit” or “SLOC” means the irrevocable standby letter of credit in the total amount of \$\_\_\_\_\_ in form, scope, and substance satisfactory to VEDP and the Locality. Such SLOC shall remain in full force and effect at all times from its date of issuance until verification of the achievement of the Targets as of the [Subsequent] Performance Date set forth in this Agreement and the fulfillment of any repayment obligations as may be required by this Agreement. Upon the issuance of satisfaction letters from VEDP and the Locality, the SLOC may be terminated. The SLOC shall be issued by a major domestic bank, approved by VEDP and the Locality. The SLOC shall provide that it can be called on and paid at a branch or office of the issuing bank and that it is payable on written demand (allowing, however, up to one business day after receipt of such demand for the issuing bank to verify the signature appearing on such demand) signed by an agent of the Locality or the Authority with a certification that repayment obligations required by this Agreement are unsatisfied in whole or in part and that certain amounts are due. Any renewal, replacement, or amendment of the SLOC must be acceptable in form, scope and substance to VEDP and the Locality.]

“Targets” means the Company’s obligations to make Capital Investments at the Facility of at least \$\_\_\_\_\_ and to create and Maintain at least \_\_\_ New Jobs at the Facility, all as of the [Initial] Performance Date. [Further, “Targets” includes the Company’s obligation to Maintain at least \_\_\_ New Jobs at the Facility as of the Subsequent Performance Date.]

“Virginia Code” means the Code of Virginia of 1950, as amended.

[SEE SECTIONS 4 AND 5, IF THE BREAK-EVEN POINT IS BEYOND THE PERFORMANCE DATE, THE COMPANY WILL BE REQUIRED TO ACHIEVE ITS TARGETS BY THE PERFORMANCE DATE, BUT WILL ALSO BE REQUIRED TO MAINTAIN ITS NEW JOBS THROUGH THE BREAK-EVEN POINT. IN THIS EVENT, THE “PERFORMANCE DATE” WILL BECOME THE “INITIAL PERFORMANCE DATE” AND A DATE AROUND THE BREAK-EVEN POINT WILL BECOME THE “SUBSEQUENT PERFORMANCE DATE.” THIS WILL BE THE DEFINITION OF “SUBSEQUENT PERFORMANCE DATE:

“Subsequent Performance Date” means \_\_\_\_\_, 20\_\_, unless the Initial Performance Date has been extended. If the Initial Performance Date has been extended, the

Subsequent Performance shall be \_\_\_ year(s) after the new Initial Performance Date. Except as so noted, the Subsequent Performance Date is not subject to extension.]

**Section 2. Targets; Statutory Criteria.**

(a) *Targets:* The Company will [purchase / construct / expand / equip / improve] and operate the Facility in the Locality, make a Capital Investment of at least \$\_\_\_\_\_, and create and Maintain at least \_\_\_ New Jobs at the Facility, all as of the [Initial] Performance Date. [Further, the Company will Maintain at least \_\_\_ New Jobs at the Facility as of the Subsequent Performance Date.]

(b) *Encouragement to Offer New Jobs to Residents of the Commonwealth:* The Locality and the Authority hereby strongly encourage the Company to ensure that at least 30% of the New Jobs are offered to “Residents” of the Commonwealth, as defined in Virginia Code Section 58.1-302. In pertinent part, that definition includes natural persons domiciled in Virginia or natural persons who, for an aggregate of more than 183 days of the year, maintained a place of abode within the Commonwealth, whether domiciled in the Commonwealth or not.

(c) *Prevailing Wage; Unemployment and Poverty Rates:* The average annual wage of the New Jobs of at least \$\_\_\_\_\_ is [less than the prevailing average annual wage in the Locality of \$\_\_\_\_\_, but is more than 85% of that prevailing average annual wage (\$\_\_\_\_\_) [more than the prevailing average annual wage in the Locality of \$\_\_\_\_\_]. The Locality is [is not] a high-unemployment locality, with an unemployment rate for 20\_\_, which is the last year for which such data is available, of \_\_\_% as compared to the 20\_\_ statewide unemployment rate of \_\_\_%. The Locality is [is not] a high-poverty locality, with a poverty rate for 20\_\_, which is the last year for which such data is available, of \_\_\_% as compared to the 20\_\_ statewide poverty rate of \_\_\_%.

(d) *Disclosure of Political Contributions:* The Company acknowledges that the name of the Company will be shared by VEDP with the Governor of Virginia, and any campaign committee or political action committee associated with the Governor. The Company acknowledges that within 18 months of the date of this Performance Agreement, the Governor, his campaign committee, and his political action committee will submit to the Virginia Conflict of Interest and Ethics Advisory Council a report listing any contribution, gift, or other item with a value greater than \$100 provided by the Company to the Governor, his campaign committee, or his political action committee, respectively, during the period from the date of the Company’s application for the COF Grant through the one-year period immediately after the date of this Agreement.

(e) *[Other Performance Criteria:* IF THE COF GRANT IS ALSO PREDICATED ON OTHER FACTORS, SUCH AS ESTABLISHING AND MAINTAINING THE COMPANY’S CORPORATE HEADQUARTERS IN VIRGINIA, ADD HERE LANGUAGE REQUIRING THE COMPANY TO DO THOSE OTHER THINGS.]

**Section 3. Disbursement of COF Grant.**

(a) *Disbursement of the COF Grant:* [IF THERE ARE NO CONDITIONS TO DISBURSEMENT:]

By no later than \_\_\_\_\_, 20\_\_, the Locality will request the disbursement to it of the COF Grant. If not so requested by the Locality by \_\_\_\_\_, 20\_\_, this Agreement will terminate. The Locality and the Company will be entitled to reapply for a COF Grant thereafter, based upon the terms, conditions and availability of funds at that time. [THIS DEADLINE DATE WILL GENERALLY BE 3 - 4 MONTHS BEYOND THE DATE THE GOVERNOR ANNOUNCES THAT THE PROJECT IS COMING TO VIRGINIA]

The COF Grant in the amount of \$\_\_\_\_\_ will be paid to the Locality, upon its request. Within 30 days of its receipt of the COF Grant proceeds, the Locality will disburse the COF Grant proceeds to the Authority. Within 30 days of its receipt of the COF Grant proceeds, the Authority will disburse the COF Grant proceeds to the Company as an inducement to the Company to achieve the Targets at the Facility. [OR INDICATE THAT THE LOCALITY OR THE AUTHORITY WILL SPEND \$ ON BEHALF OF THE COMPANY]

(a) *Disbursement of the COF Grant:* [IF THE PROVISION OF A SLOC IS A CONDITION TO DISBURSEMENT:]

As security for the performance of the Company's obligations under this Agreement, the Company will provide a Standby Letter of Credit. Such Standby Letter of Credit shall be delivered to the Authority no later than 30 days after the date of this Agreement.

By no later than \_\_\_\_\_, 20\_\_, the Locality will request the disbursement to it of the COF Grant, but only after the Locality has received the Standby Letter of Credit. If not so requested by the Locality by \_\_\_\_\_, 20\_\_, this Agreement will terminate. The Locality and the Company will be entitled to reapply for a COF Grant thereafter, based upon the terms, conditions and availability of funds at that time.

The COF Grant in the amount of \$\_\_\_\_\_ will be paid to the Locality, upon its request. Within 30 days its receipt of the COF Grant proceeds, the Locality will disburse the COF Grant proceeds to the Authority. Within 30 days of its receipt of the COF Grant proceeds, the Authority will disburse the COF Grant proceeds to the Company as an inducement to the Company to achieve the Targets at the Facility. [OR INDICATE THAT THE LOCALITY OR THE AUTHORITY WILL SPEND \$ ON BEHALF OF THE COMPANY]

(a) *Disbursement of the COF Grant:* [IF THERE ARE PERFORMANCE METRICS TIED TO THE DISBURSEMENT:]

By no later than \_\_\_\_\_, 20\_\_, the Locality will request the disbursement to it of the COF Grant. If not so requested by the Locality by \_\_\_\_\_, 20\_\_, this Agreement will terminate. The Locality and the Company will be entitled to reapply for a COF Grant thereafter, based upon the terms, conditions and availability of funds at that time. [THIS

DEADLINE DATE WILL GENERALLY BE 3 - 4 MONTHS BEYOND THE DATE THE GOVERNOR ANNOUNCES THAT THE PROJECT IS COMING TO VIRGINIA]

The disbursement of the COF Grant proceeds to the Company will serve as an inducement to the Company to achieve the Targets at the Facility. The COF Grant proceeds shall be retained by the Locality and shall be disbursed in \_\_\_\_\_ payments as follows: [OR, FUNDS COULD BE SENT FROM LOCALITY TO AUTHORITY, WITH THE AUTHORITY HOLDING, THEN DISBURSING, FUNDS]

*First Payment:* The Company will provide notice and evidence reasonably satisfactory to the Locality, the Authority, and VEDP that it has [created and Maintained at least \_\_\_ New Jobs] [received a Certificate of Occupancy for the Facility][made Capital Investments of at least \$\_\_\_\_\_][and, \_\_\_\_\_]. Such evidence will be subject to verification by the Locality and VEDP. Within 30 days of the verification, the Locality will disburse \$\_\_\_\_\_ of the COF Grant proceeds to the Authority. Within 30 days of its receipt of such COF Grant proceeds, the Authority will disburse such COF Grant proceeds to the Company.

*Second Payment:* The Company will provide notice and evidence reasonably satisfactory to the Locality, the Authority, and VEDP that it has [created and Maintained at least an additional \_\_\_ New Jobs (for an aggregate of \_\_\_ New Jobs)][received a Certificate of Occupancy for the Facility][made additional Capital Investments of at least \$\_\_\_\_\_ (for an aggregate of \$\_\_\_\_\_ of Capital Investments)][and, \_\_\_\_\_]. Such evidence will be subject to verification by the Locality and VEDP. Within 30 days of the verification, the Locality will disburse \$\_\_\_\_\_ of the COF Grant proceeds to the Authority. Within 30 days of its receipt of such COF Grant proceeds, the Authority will disburse such COF Grant proceeds to the Company.

*Third Payment:* The Company will provide notice and evidence reasonably satisfactory to the Locality, the Authority, and VEDP that it has [created and Maintained at least an additional \_\_\_ New Jobs (for an aggregate of \_\_\_ New Jobs)][received a Certificate of Occupancy for the Facility][made additional Capital Investments of at least \$\_\_\_\_\_ (for an aggregate of \$\_\_\_\_\_ of Capital Investments) [and, \_\_\_\_\_]. Such evidence will be subject to verification by the Locality and VEDP. Within 30 days of the verification, the Locality will disburse the remaining \$\_\_\_\_\_ of the COF Grant proceeds to the Authority. Within 30 days of its receipt of such COF Grant proceeds, the Authority will disburse such COF Grant proceeds to the Company.

If any COF Grant proceeds have not been disbursed to the Company within 90 days of the [Initial] Performance Date, the Locality shall return such proceeds to VEDP for redeposit to the Commonwealth's Development Opportunity Fund.

(b) *Use of the COF Grant Proceeds:* The [Company / Locality / Authority] will use the COF Grant proceeds to \_\_\_\_\_, as permitted by Section 2.2-115(D) of the Virginia Code.

**Section 4. Break-Even Point; State and Local Incentives.**

(a) *State-Level Incentives:* VEDP has estimated that the Commonwealth will reach its “break-even point” by the [Subsequent] Performance Date. The break-even point compares new revenues realized as a result of the Capital Investment and New Jobs at the Facility with the Commonwealth’s expenditures on incentives, including but not limited to the COF Grant. With regard to the Facility, the Commonwealth expects to provide incentives in the following amounts:

<u>Category of Incentive:</u>	<u>Total Amount</u>
COF Grant	\$ _____
Virginia Jobs Investment Program (“VJIP”) (Estimated)	
Tobacco Region Opportunity Fund Grant (“TROF”)	
Enterprise Zone Real Property Improvement Grant (“EZRPIG”) (Estimated)	
Enterprise Zone Job Creation Grant (“EZJCG”) (Estimated)	
Virginia Investment Partnership Grant (“VIP Grant”)	
Major Eligible Employers Grant (“MEE Grant”)	
Virginia Economic Development Incentive Grant (“VEDIG”)	
Major Business Facilities Job Tax Credit (“MBFJTC”) (Estimated)	

The proceeds of the COF Grant shall be used for the purposes described in Section 3(b). The VJIP grant proceeds shall be used by the Company to pay or reimburse itself for recruitment and training costs. [The proceeds of the TROF Grant [shall][may] be used for \_\_\_\_\_ [any lawful purpose].] [The proceeds of [the EZRPIG,] [the EZJCG,] [the VIP Grant,] [the MEE Grant] [and the VEDIG] may be used by the Company for any lawful purpose.] [The MBFJTC will serve as an offset to Virginia corporate income taxes that may be owed by the Company.]

(b) *Locality-Level Incentives:* The Locality expects to provide the following incentives, as matching grants or otherwise, for the Facility:

<u>Category of Incentive:</u>	<u>Total Amount</u>
-------------------------------	---------------------

**[IF THE LOCALITY'S FUNDS ARE BEING PROVIDED OVER TIME:** If, by the [Initial] Performance Date, the [proceeds / funds] disbursed or committed to be disbursed by the Locality to the Company total less than the \$\_\_\_\_\_ COF Grant local match requirement, the Locality, subject to appropriation, will make an additional grant to the Company of the difference at the [Initial] Performance Date, so long as the Company has met its Targets.]

The proceeds of the Locality's \_\_\_\_\_ [may / shall] be used by the Company for [any lawful purpose / \_\_\_\_\_].

**Section 5. Repayment Obligation.**

(a) *If Statutory Minimum Eligibility Requirements are Not Met:* Section 2.2-115 of the Virginia Code requires that the Company make a Capital Investment of at least [\$5,000,000][\$2,500,000][\$1,500,000] in the Facility and create and Maintain at least [50][25][15] New Jobs at the Facility in order to be eligible for the COF Grant. Failure by the Company to meet either of these statutory minimum eligibility requirements by the [Initial] Performance Date shall constitute a breach of this Agreement [and the entire COF Grant must be repaid by the Company to the Authority][ and the Company must repay to the Authority all of the COF Grant proceeds previously disbursed to the Company. In such event, the Locality will repay to VEDP all of the COF Grant proceeds not previously disbursed to the Company].

(b) *Allocation of COF Proceeds:* For purposes of repayment under subsection (c), the COF Grant is to be allocated as 50% ([up to] \$\_\_\_\_\_) for the Company's Capital Investment Target, and 50% ([up to] \$\_\_\_\_\_) for the Company's New Jobs Target. [ADJUST IF THERE IS A THIRD TARGET]

(c) *If Statutory Minimum Eligibility Requirements are Met:* [IF THE COF IS PAID IN FULL UP-FRONT] The provisions of this subsection (c) shall become applicable only if the Company has met the statutory minimum eligibility requirements set forth in subsection (a). [Except as noted in subsection (d) below,] [i]f the Company has met at least 90% of both of the Targets at the [Initial] Performance Date, then and thereafter the Company is no longer obligated to repay any portion the COF Grant. If the Company has not met at least 90% of either or both of its Targets at the [Initial] Performance Date, the Company shall repay to the Authority that part of the COF Grant that is proportional to the Target or Targets for which there is a shortfall. For example, if at the [Initial] Performance Date, the Capital Investment is only \$\_\_\_\_\_ (reflecting achievement of \_\_\_% of the Capital Investment Target) and only \_\_\_ New Jobs have been created and Maintained (reflecting achievement of \_\_\_% of the New Jobs Target), the Company shall repay to the Authority \_\_\_% of the moneys allocated to the Capital Investment Target (\$\_\_\_\_\_) and \_\_\_% of the moneys allocated to the New Jobs Target (\$\_\_\_\_\_).

[IF THE COF IS PAID IN INSTALLMENTS UPON THE ACHIEVEMENT OF PERFORMANCE METRICS] The provisions of this subsection (c) shall become applicable only if the Company has met the statutory minimum eligibility requirements set forth in subsection (a). [Except as noted in subsection (d) below,] [i]f the Company has met at least ninety percent (90%) of both of the Targets at the [Initial] Performance Date, then and thereafter

the Company is no longer obligated to repay any portion the COF Grant. If the Company has not met at least ninety percent (90%) of either or both of its Targets as of the [Initial] Performance Date, the Company shall repay to the Authority that part of the COF Grant previously disbursed to the Company that is proportional to the Target or Targets for which there is a shortfall. For example, if as of the Performance Date, the Company has received \$\_\_\_\_\_ of the COF Grant proceeds, but the Capital Investment is only \$\_\_\_\_\_, or \_\_\_% of the Capital Investment Target, and only \_\_\_New Jobs have been created and Maintained, or \_\_\_% of the New Jobs Target, the Company shall repay to the Authority \_\_\_% of the COF Grant proceeds that it received allocated to the Capital Investment Target or \$\_\_\_\_\_, and \_\_\_% of the COF Grant proceeds that it received allocated to the New Jobs Target or \$\_\_\_\_\_. In such event, the Locality will repay to VEDP all of the COF Grant proceeds not previously disbursed to the Company.

[(d)(e)] *Determination of Inability to Comply:* If the Locality or VEDP shall determine at any time prior to the [Initial] Performance Date (a “Determination Date”) that the Company is unable or unwilling to meet and Maintain its Targets by and through the [Initial] Performance Date, and if the Locality, the Authority or VEDP shall have promptly notified the Company of such determination, the Company must repay to the Authority all of the COF Grant proceeds previously disbursed to the Company. In such event, the Locality will repay to VEDP all of the COF Grant proceeds not previously disbursed to the Company. Such a determination will be based on such circumstances as a filing by or on behalf of the Company under Chapter 7 of the U.S. Bankruptcy Code, the liquidation of the Company, an abandonment of the Facility by the Company or other similar significant event that demonstrates the Company will be unable or is unwilling to satisfy the Targets for the COF Grant.

[(e)(f)] *Repayment Dates:* ***Such repayment shall be due from the Company to the Authority within ninety days of the [Initial] Performance Date [, the Subsequent Performance Date] or the Determination Date, as applicable.*** Any moneys repaid by the Company to the Authority hereunder shall be repaid by the Authority to the Locality and shall be repaid by the Locality promptly to VEDP for redeposit into the Governor’s Development Opportunity Fund. The Locality and the Authority shall use their best efforts to recover such funds, including legal action for breach of this Agreement. [Except for funds received from a draw on the Standby Letter of Credit,] [N]either the Locality nor the Authority shall have any responsibility for the repayment of any sums payable by the Company hereunder unless said sums have been received by the Authority from the Company.

[The Locality will draw on the Standby Letter of Credit for any amount due from the Company under this Agreement. Such amount will be paid by the Locality to VEDP for deposit into the Commonwealth’s Development Opportunity Fund. The Company will have no interest in or claim upon the funds paid under such Standby Letter of Credit.]

[SEE SECTIONS 1 AND 4. IF THE BREAK-EVEN POINT IS BEYOND THE INITIAL PERFORMANCE DATE, A NEW SUBSECTION (d) WILL BE ADDED TO SECTION 5, SUBSTANTIALLY AS FOLLOWS:

[(d) *Further Performance Target for the Maintenance of the New Jobs:* If the Company had no repayment obligation under subsection (a) above or under subsection (c) above as to the New Jobs Target, the Company may still have a repayment obligation if it has not Maintained the New Jobs from the Initial Performance Date through the Subsequent Performance Date. If the Company has received all of the proceeds of the COF Grant, but has not Maintained at least \_\_\_ New Jobs (90% of \_\_\_ New Jobs) through the Subsequent Performance Date, the Company shall repay to the Authority that part of COF Grant that is proportional to the shortfall from the \_\_\_ New Jobs. For example, if at the Subsequent Performance Date, only \_\_\_ New Jobs have been Maintained, the Company shall repay to the Authority \_\_\_% of the moneys allocated and disbursed related to New Jobs (\$\_\_\_\_\_).]

## **Section 6. Company Reporting.**

The Company shall provide, at the Company's expense, detailed verification reasonably satisfactory to the Locality, the Authority and VEDP of the Company's progress on the Targets. Such progress reports will be provided annually, starting at \_\_\_\_\_, 20\_\_ and covering the period through the prior \_\_\_\_\_. Further, the Company shall provide such progress reports at such other times as the Locality, the Authority or VEDP may reasonably require. [If the Company wishes to count as New Jobs employees of contractors, to the extent permitted in the definition of "New Jobs" in Section 1, the Company is responsible for assembling and distributing the documentation necessary to verify such New Jobs, including whether such jobs are net New Jobs in the Commonwealth.] [If the Company wishes to count as Capital Investments the capital expenditures made on its behalf by a lessor or a developer of the Facility, the Company is responsible for assembling and distributing the documentation necessary to verify the capital expenditures made on behalf of the Company.]

With each such progress report, the Company shall report to VEDP the amount paid by the Company in the prior calendar year in Virginia corporate income tax [or, as applicable, shall provide to VEDP a copy of its Virginia income tax form filed with respect to its status as a pass-through entity.] VEDP has represented to the Company that it considers such information to be confidential proprietary information that is exempt from public disclosure under the Virginia Freedom of Information Act and that such information will be used by VEDP solely in calculating aggregate return on invested capital analyses for purposes of gauging the overall effectiveness of economic development incentives.

The Company hereby authorizes the Locality, including the Locality's [Commissioner of the Revenue and Treasurer], to release to VEDP the Company's real estate tax, business personal property tax and machinery and tools tax information. Such information shall be marked and considered confidential and proprietary and shall be used by VEDP solely for verifying satisfaction of the Capital Investment Target. If the Locality, [the Office of the Commissioner of the Revenue or the Office of the Treasurer] should require additional documentation or consents from the Company to access such information, the Company shall promptly provide, at the Company's expense, such additional documentation or consents as the Locality, the Authority or VEDP may request.

If requested by VEDP, the Company shall provide to VEDP copies of the Company's quarterly filings with the Virginia Employment Commission covering the period from the date of this Agreement through the [Subsequent] Performance Date.

**Section 7. Notices.**

Formal notices and communications between the Parties shall be given either by (i) personal service, (ii) delivery by a reputable document delivery service that provides a receipt showing date and time of delivery, (iii) mailing utilizing a certified or first class mail postage prepaid service of the United States Postal Service that provides a receipt showing date and time of delivery, or (iv) delivery by facsimile or electronic mail (email) with transmittal confirmation and confirmation of delivery, addressed as noted below. Notices and communications personally delivered or delivered by document delivery service shall be deemed effective upon receipt. Notices and communications mailed shall be deemed effective on the second business day following deposit in the United States mail. Notices and communications delivered by facsimile or email shall be deemed effective the next business day, not less than 24 hours, following the date of transmittal and confirmation of delivery to the intended recipient. Such written notices and communications shall be addressed to:

if to the Company, to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile: \_\_\_\_\_  
Email: \_\_\_\_\_  
Attention: \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile: \_\_\_\_\_  
Email: \_\_\_\_\_  
Attention: \_\_\_\_\_

if to the Locality, to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile: \_\_\_\_\_  
Email: \_\_\_\_\_  
Attention: \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile: \_\_\_\_\_  
Email: \_\_\_\_\_  
Attention: \_\_\_\_\_

if to the Authority, to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile: \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile: \_\_\_\_\_

Email: \_\_\_\_\_  
Attention: \_\_\_\_\_

Email: \_\_\_\_\_  
Attention: \_\_\_\_\_

if to VEDP, to:

with a copy to:

Virginia Economic Development Partnership  
One James Center, Suite 900  
901 East Cary Street  
Post Office Box 798 (zip: 23218-0798)  
Richmond, Virginia 23219  
Facsimile: 804.545.5611  
Email: dgundersen@yesvirginia.org  
Attention: Interim President and CEO

Virginia Economic Development Partnership  
One James Center, Suite 900  
901 East Cary Street  
Post Office Box 798 (zip: 23218-0798)  
Richmond, Virginia 23219  
Facsimile: 804.545.5611  
Email: smcninch@yesvirginia.org  
Attention: General Counsel

**Section 8. Miscellaneous.**

(a) *Entire Agreement; Amendments:* This Agreement constitutes the entire agreement [between][among] the parties hereto as to the COF Grant and may not be amended or modified, except in writing, signed by each of the parties hereto and consented to by VEDP. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. The Company may not assign its rights and obligations under this Agreement without the prior written consent of the Locality, the Authority and VEDP.

(b) *Governing Law; Venue:* This Agreement is made, and is intended to be performed, in the Commonwealth and shall be construed and enforced by the laws of the Commonwealth. Jurisdiction and venue for any litigation arising out of or involving this Agreement shall lie in the Circuit Court of the City of Richmond, and such litigation shall be brought only in such court.

(c) *Counterparts:* This Agreement may be executed in one or more counterparts, each of which shall be an original, and all of which together shall be one and the same instrument.

(d) *Severability:* If any provision of this Agreement is determined to be unenforceable, invalid or illegal, then the enforceability, validity and legality of the remaining provisions will not in any way be affected or impaired, and such provision will be deemed to be restated to reflect the original intentions of the parties as nearly as possible in accordance with applicable law.

(e) *Attorney's Fees:* Attorney's fees shall be paid by the party incurring such fees.

[THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

**IN WITNESS WHEREOF**, the parties hereto have executed this Performance Agreement as of the date first written above.

\_\_\_\_\_ **OF** \_\_\_\_\_, **VIRGINIA**

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**INDUSTRIAL/ECONOMIC  
DEVELOPMENT AUTHORITY OF  
THE \_\_\_\_\_ OF \_\_\_\_\_,  
VIRGINIA**

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**[COMPANY]**

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_