Guidelines for the
Governor's Development Opportunity Fund Program

Purpose:

The Governor's Development Opportunity Fund (GOF) 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 GOF can be found at Section 2.2-115 of the Code of Virginia of 1950, as amended (the GOF Act).

Guiding Principles and Statutory Conditions:

GOF 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. 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 the Commonwealth.

Grants will not be made for projects which have been publicly announced prior to the Governor's approval and public announcement of a grant award.

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 GOF 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 GOF 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 Appropriations Act directs the Virginia Economic Development Partnership (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.

It is the policy of the Commonwealth that GOF 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.

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

In assessing the amount of a GOF 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.

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

Statutory Eligibility:

The GOF 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 **<u>or</u>** 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 **<u>or</u>** 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:

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.

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 created pursuant to the GOF Grant 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 GOF grantee's employment levels (so long as there is active recruitment for open positions), (ii) strikes and (iii) other temporary work stoppages.

If there are existing jobs at the company's facility (or at a contractor's facility, if applicable), it is expected that the GOF 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.

If a company is relocating or expanding its operations, but is simultaneously closing or substantially reducing its operations in another Virginia locality, the jobs at the new or expanding location will count as "new jobs" only if the Secretary of Commerce and Trade agrees to this exception to the general policy and provides written notice to the Chairmen of the Senate Finance and House Appropriations Committees justifying such exception.

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.

In the performance agreement for the GOF 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.

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.

Provisions Regarding Capital Investment:

"Capital investment" is used in these Guidelines to mean "private investment" under the GOF 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 in taxable real property, taxable tangible personal property, or both, at the company's facility in the locality.

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.

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

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.

Determination of Grant Amount and Conditions:

In determining grant amounts, the following criteria will be considered: 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 GOF grant through June 30, 2015 is $1,500,000. In very unique circumstances, the Governor may waive this limit for projects that the Governor has determined are of statewide or regional interest.

Localities may receive more than one GOF 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.

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 GOF application. The company will be offered an opportunity to explain such actions and to provide assurances regarding the expected new jobs and capital investment.

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.

Local Matches:

Localities must at least match dollar-for-dollar with local funds the amount requested from the GOF. 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 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.

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 to the locality from the Tobacco Region Opportunity Fund may be used as up to one-half of the matching funds.

Use of GOF Proceeds:

GOF 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 GOF 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:

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.

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 GOF is being sought;

- Amount requested and the 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)
    - Sales and revenues and the timeframe in which they occurred/were generated
    - 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 of a locality receiving 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 GOF 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 GOF application that this notification has taken place, and must also provide the reasons for the move and the out-of-state competition; 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.

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 GOF, 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 existing jobs to be retained and 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 the company at the facility in the community within 3 years of the expected receipt of the grant by the community;

- 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;

- 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 may 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. VEDP's President and Chief Executive Officer may request additional financial information from the company, including financial information and satisfactory evidence of a company's financial stability. It is likely that such information will be requested and reviewed prior to a decision on whether to recommend a GOF grant for a start-up company or for a new division or operation for an existing company.

Contractual Arrangements:

Since a GOF grant is awarded to a community, the community is required to enter into a performance agreement with the company before it may receive the GOF 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 performance agreement will set forth the capital investment and new jobs targets.

The performance agreement will likely contain a date by which the community must request the GOF 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 GOF 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.

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.

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 GOF 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.

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

Generally, GOF grants are broken into 50% for job creation and 50% for capital investment. **The company must meet the statutory minimums for <u>both</u> jobs <u>and</u> investment detailed in the "Statutory Eligibility" section or be subject to a 100% clawback.** 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 clawback in proportion to the underperformance for each respective component. If the Company meets at least 90% of its new jobs <u>and</u> capital investment targets by the Performance Date, there will be no clawback, assuming that the statutory minimum requirements have been achieved.

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.

The performance agreement will likely contain a provision that will require a 100% clawback 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.

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.

Upon approval of a GOF 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.

For VEDP to demonstrate the value of the GOF 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. 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 basic form of a performance agreement is attached to these Guidelines.

Miscellaneous:

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

If the Virginia General Assembly deposits federal funds into the GOF 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.

The Company may not assign its rights or obligations under a GOF 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.

The GOF provisions described in these guidelines reflect the GOF provisions in the Virginia Code as of July 1, 2014. 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 GOF grantees with written notice of any such changes.

GOVERNOR'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/limited liability company] [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 Governor's Development Opportunity Fund (a "GOF 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 GOF Grant, the use of the GOF Grant proceeds, the obligations of the Company regarding Capital Investment and New Job creation, and the repayment by the Company of all or part of the GOF Grant under certain circumstances;

WHEREAS, the [purchase/construction/expansion/equipping/improvement] and operation of the Facility will entail a capital expenditure 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 GOF 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. <u>Definitions</u>.

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 [excluding the purchase of land or existing real property improvements]. [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 created pursuant to the GOF Grant 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 paid 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 GOF CHECK NEEDS TO BE REQUESTED]

"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 THE DATE OF 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.

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.]

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.

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 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 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 ___%.]

[IF THE GOF 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. <u>Disbursement of GOF Grant</u>.

By no later than _____, 20__, the Locality will request the disbursement to it of the GOF 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 GOF 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 GOF Grant in the amount of $_____ will be paid to the Locality, upon its request. Within 30 days of its receipt of the GOF Grant proceeds, the Locality will disburse the GOF Grant proceeds to the Authority. Within 30 days of its receipt of the GOF Grant proceeds, the Authority will disburse the GOF 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] The [Company/Locality/Authority] will use the GOF Grant proceeds to _____, as permitted by Section 2.2-115(D) of the Virginia Code.

Section 4. <u>Break-Even Point; State and Local Incentives</u>.

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 GOF 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>

GOF Grant $_____
Virginia Jobs Investment Program ("VJIP") (Estimated)
Tobacco Region Opportunity Fund Grant ("TROF")

The Locality expects to provide the following incentives, as matching grants or otherwise, for the Facility:

Category of Incentive: Total Amount

[IF THE LOCALITY'S FUNDS ARE BEING PROVIDED OVER TIME: If, by the [Initial] Performance Date, the _____ funds disbursed or committed to be disbursed by the Locality to the Company total less than the $_____ GOF 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 GOF Grant shall be used for the purposes described in Section 3. 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 be used for _____.] [The Enterprise Zone / VIP / MEE / VEDIG Grant proceeds may be used by the Company for any lawful purpose.] [The Major Business Facilities Job Tax Credits/Green Jobs Tax Credits are an offset to Virginia corporate income taxes that may be owed by the Company.] The proceeds of the Locality's _____ [may/ shall] be used by the Company for [any lawful purpose / _____].

Section 5. <u>Repayment Obligation</u>.

(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 $_____ in the Facility and create and Maintain at least ___ New Jobs at the Facility in order to be eligible for the GOF 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 GOF Grant must be repaid by the Company to the Authority.

(b) *If Statutory Minimum Eligibility Requirements are Met:* The provisions of this subsection (b) shall become applicable only if the Company has met the statutory minimum eligibility requirements set forth in subsection (a). For purposes of repayment, the GOF Grant is to be allocated as $_____ (50%) for the Company's Capital Investment Target and $_____ (50%) for its New Jobs Target. Except as noted in subsection [(c)/(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 GOF 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 GOF 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 ($_____).

[(c)(d)]*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 the entire GOF Grant to the Authority. 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 GOF Grant.

[(d)(e)]*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. Neither the Locality nor the Authority shall have any responsibility for the repayment of any sums hereunder unless said sums have been received by the Authority from the Company.

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

(c) *Further Performance Target for the Maintenance of the New Jobs:* If the Company had no repayment obligation under subsection (a) above or under subsection (b) 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 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 GOF 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 to New Jobs ($_____).]

Section 6. <u>Company Reporting</u>.

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. 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.

Section 7. <u>Notices</u>.

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 to:

if to the Company, to:	with a copy to:
_____	_____
_____	_____
_____	_____
_____	_____
Facsimile: _____	Facsimile: _____
Email: _____	Email: _____
Attention: _____	Attention: _____

if to the Locality, to:	with a copy to:
_____	_____
_____	_____
_____	_____
_____	_____

Facsimile: _____
Email: _____
Attention: _____

if to the Authority, to:

_____
_____
_____
_____
Facsimile: _____
Email: _____
Attention: _____

if to VEDP, to:

Virginia Economic Development Partnership
901 East Byrd Street, 19th Floor
Post Office Box 798 (zip: 23218-0798)
Richmond, Virginia 23219
Facsimile: 804.545.5611
Email: mbriley@yesvirginia.org
Attention: President and CEO

Facsimile: _____
Email: _____
Attention: _____

with a copy to:

_____
_____
_____
_____
Facsimile: _____
Email: _____
Attention: _____

with a copy to:

Virginia Economic Development Partnership
901 East Byrd Street, 19th Floor
Post Office Box 798 (zip: 23218-0798)
Richmond, Virginia 23219
Facsimile: 804.545.5611
Email: smcninch@yesvirginia.org
Attention: General Counsel

Section 8. <u>Miscellaneous</u>.

(a) *Entire Agreement; Amendments*: This Agreement constitutes the entire agreement [between/among] the parties hereto as to the GOF Grant and may not be amended or modified, except in writing, signed by each of the parties hereto. 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: _____