VEDP Policies and Procedural Guidelines for the Commonwealth's Development Opportunity Fund Approved by VEDP Board of Directors on June 7, 2018

PURPOSE

The Virginia Economic Development Partnership (VEDP) is tasked with administering monitoring and reviewing the status and progress of the performance requirements for the Commonwealth's Development Opportunity Fund (COF) in accordance with Section 2.2-115 of the Code of Virginia of 1950, as amended (the Virginia Code).

These Policies and Procedural Guidelines will address the statutory and other requirements for qualifying for grant awards, and other administrative matters. The 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 Section 2.2-115 of the Virginia Code.

GUIDING PRINCIPLES

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

- 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.

- Traded Sector Projects Only: Grants will only be awarded for traded sector projects – i.e., projects for companies or functions that provide net 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 the Commonwealth or will be paid for with funds from outside the Commonwealth.

- Incentive Philosophy: These factors, among others, will be considered by VEDP when determining whether to recommend discretionary incentives:
    - proportion of company revenues derived from outside Virginia, including international exports (i.e., determination of traded employer)
    - employment multiplier
    - wages compared to local average wage
    - alignment with strategic sectors and state/local strategies

    - solution to a competitive need
    - establishment of a competitive advantage
    - ability to leverage other state and local resources
    - advancement of the quality of life

- Grant Amounts: In determining grant amounts, the following criteria will be considered:
    - return on investment
    - new jobs
    - wage levels
    - overall employment
    - capital investment
    - area and regional unemployment – areas of high unemployment, poverty and fiscal stress
    - commercial development along existing transportation/transit corridors within regions
    - proximity to existing public infrastructure
    - locality's interest in the project
    - industry or company growth potential

- Allocations: In accordance with Section 2.2-115 C "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 Fund in every such five-year period shall 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. However, if such one-third requirement will not be met because economic development prospects in such counties and cities are unable to fulfill the applicable minimum private investment and new jobs requirements set forth in this section, then any funds remaining in the Fund 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." VEDP will compile a report at each fiscal year end to include the most current five-year period to ensure compliance is maintained.

  Section 2.2-115 F.1.: "The guidelines and criteria shall include provisions for geographic diversity and a cap on the amount of funds to be provided to any individual project. At the discretion of the Governor, this cap may be waived for qualifying projects of regional or statewide interest. In developing the guidelines and criteria, the Virginia Economic Development Partnership shall use the measure for Fiscal Stress published by the Commission on Local Government of the Department of Housing and Community Development for the locality in which the project is located or will be located as one method of determining the amount of assistance a locality shall receive from the Fund." The maximum amount of a

COF grant through June 30, 2019 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.

- 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.

- Relocations: Section 2.2-115 D "…the Fund shall 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, unless the procedures set forth in § 30-310 are followed. The Secretary of Commerce and Trade shall enforce this policy and for any exception thereto shall, pursuant to § 30-310, submit such projects to the MEI Project Approval Commission established pursuant to § 30-309."

- 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 such company filing a COF application, there may be a bias toward not approving such application. The company will be offered an opportunity to explain such actions and to provide assurances regarding the expected new jobs and capital investment.

- 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.

USE OF COF PROCEEDS

In accordance with Section 2.2-115 D of the COF Act, 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."

STATUTORY ELIGIBILITY

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

<u>General Eligibility Thresholds:</u> Section 2.2-115 E.1.a. and E.1.b.

- 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

<u>Eligibility Thresholds in Localities with Above-Average Unemployment or Above-Average Poverty (so-called distressed localities):</u> Section 2.2-115 E.2 and E.4

- 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, the thresholds are:
    - 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

<u>Eligibility Thresholds in Localities with Above-Average Unemployment **and** Above-Average Poverty (so-called double distressed):</u> Section 2.2-115 E.3. and E.4

- 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>**and**</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, the thresholds are:

- 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

In accordance with Section 2.2-115 A "Prevailing average wage" means that amount determined by the Virginia Employment Commission to be the average wage paid workers in the city or county of the Commonwealth where the economic development project is located. The prevailing average wage shall be determined without regard to any fringe benefits.

Data from the Bureau of Labor Statistics' Local Area Unemployment Statistics (LAUS) is the primary source of annual unemployment rates (https://data.virginialmi.com).

POLICY REGARDING NEW JOBS

- Definition of New Job: VEDP uses a definition of "new job" that reads as follows (Section 2.2-115 A): "New job" means employment of an indefinite duration, created as the direct result of the private investment, for which the firm pays the wages and provides standard fringe benefits for its employee, requiring a minimum of either (i) 35 hours of the employee's time a week for the entire normal year of the firm'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 to the location of the economic development project, positions with construction contractors, suppliers, and multiplier or spin-off jobs may not qualify as new jobs. The term "new job" shall include positions with contractors provided that all requirements included within the definition of the term are met.

  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 (as determined by VEDP), 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: Section 2.2-115 F.2.b.(vii):

"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.

- Date from Which to Count New Jobs: For the expansion of an existing facility, the date from which VEDP will start counting new jobs generally 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.

- 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.

- Verification of New Jobs: VEDP will verify company reports per its verification policies and procedural guidelines.

POLICY 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 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.

- Date from Which to Count Capital Investment: For an expansion of an existing facility, the date from which VEDP will start counting capital investment generally 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.

- Verification of Capital Investment: VEDP will verify company reports per its verification policies and procedural guidelines.

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.

APPLICATION PROCESS

Once the due diligence process is complete and a COF grant has been pre-approved for a company, the company can submit an application to VEDP.

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 three 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 three 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 duration of the performance period;
- 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.

PERFORMANCE AGREEMENT

Performance Agreement Between VEDP, 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. It is expected that the performance agreement will also have the community's industrial or economic development authority, and VEDP as parties. (Section 2.2-115 F.2.a. of the Code of Virginia)

Targets and Statutory Criteria: The performance agreement will set forth the (i) capital investment target; (ii) new jobs target; (iii) wage target; (iv) fair market value of all funds the Commonwealth is expected to provide; (v) fair market value of the local match; (vi) prevailing average wage in locality; (vii) performance date; (viii) reporting and target verification procedures; and (ix) any repayment obligations.

Disbursement of COF Grant: The performance agreement generally will call for the COF grant to be disbursed by VEDP to the locality. The performance agreement will then contain the terms and conditions under which the locality may cause the COF grant proceeds to be disbursed to the company. In some circumstances, but only with the consent of the locality, VEDP may cause the COF grant proceeds to be disbursed directly to the company, upon the terms and conditions to be set forth in the performance agreement.

Performance Date: The performance agreement will include an end-date by which the company will achieve the capital investment and new jobs targets ("Performance Date"). The Performance Date is generally 36 months after the date the project is announced. 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 request an extension of up to 15 months. Any extension of the Performance Date requires prior approval by VEDP's Project Review and Credit Committee ("PRACC") and the VEDP Board of Directors. Any additional extensions must be approved by PRACC, the VEDP Board, and the Major Employment and Investment Project Approval Commission. Section 2.2-115 F.2.b. and 2.2-2237.2.

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-investment 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 of proper legal form. The OAG will have up to seven days to provide written comments regarding the performance agreement.

MISCELLANEOUS

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.

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, the Joint Legislative Audit and Review Commission, and the general public.

POLICY REGARDING FAILURE TO ACHIEVE TARGETS

Failure to Achieve Full Compliance with Statutory Minimum Eligibility Requirements:
Failure by a company to meet the statutory minimums for both jobs and investment detailed in the "Statutory Eligibility" section will constitute a breach of the performance agreement, and the COF grant is subject to a 100% repayment.

If Statutory Minimum Eligibility Requirements Are Met: If a 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. 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. Therefore, if the value of a company's capital investment and net new job creation were given equal weight then, for example, if a company has achieved the minimum statutory thresholds and 60% of the capital investment target and 75% of the new jobs target, such company will be required to repay 40% of the moneys allocated to the capital investment and 25% of the moneys allocated to the new jobs.

Determination of Inability to Comply: If at any time the community or VEDP concludes that the company will be unable or unwilling to meet its new jobs and capital investment targets by the performance date, the entire COF grant will be subject to repayment. 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.

Repayment: 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.

If appropriate, VEDP may agree to accept a repayment in installments. The VEDP Board of Directors may direct the Office of the Attorney General to assist with the enforcement of a repayment.