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

Purpose:

The Virginia Economic Development Partnership (VEDP) Division of Incentives (Incentives Division) is tasked with monitoring and reviewing the status and progress of the performance requirements for certain economic development incentives in accordance with Section 2.2-2237.3 of the Code of Virginia of 1950, as amended (the Virginia Code).

These Policies and Procedural Guidelines outline how the staff of VEDP will adhere to §2.2-2237.3 C of the Code of Virginia which states:

> Any contract or memorandum of understanding for the award of economic development incentives by the Commonwealth shall set forth the investment and job creation requirements for the payment of the incentive and shall include a stipulation that the business beneficiary of the incentives shall be liable for the repayment of all or a portion of the incentives if the business beneficiary fails to make the required investments or create the required number of jobs. If it is determined that a business beneficiary is liable for the repayment of all or a portion of an economic development incentive awarded by the Board, the Board may direct the Office of the Attorney General to enforce the provisions of the contract or memorandum of understanding regarding the repayment.

It shall be the policy of VEDP that all performance agreements drafted by VEDP for the Commonwealth's Development Opportunity Fund ("COF") that may allow for a potential repayment will contain language stipulating that the business beneficiary will be liable for the repayment of the incentive if the investment and net new jobs targets as stated in the performance agreement are not met. This directive is also noted in VEDP's *Guidelines for the Virginia Economic Development Partnership's Due Diligence Process for Discretionary Incentives.*

Failure of Full Compliance:

The respective locality 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. **The company must meet the statutory minimums for both new jobs and capital 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 <u>and</u> capital investment targets by the stated performance date, there will be no repayment, assuming that the statutory minimum requirements have been achieved.

If Statutory Minimum Eligibility Requirements are Not Met:

For a COF grant, §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 stated performance date will constitute a breach of the performance agreement and the company must repay all of the COF grant proceeds previously disbursed to the company. In such event, the respective locality will repay to VEDP all of the COF grant proceeds not previously disbursed to the company.

If Statutory Minimum Eligibility Requirements are Met:

For those COF grants paid up-front: if the company has met at least 90% of both of the performance targets at the stated performance date (and any subsequent performance dates), then and thereafter the company is no longer obligated to repay any portion of the COF grant. If the company has not met at least 90% of its performance targets, the company shall repay to the Authority that part of the COF grant that is proportional to the performance target or targets for which there is a shortfall. For example, if at the stated performance date, the capital investment is only 60% of the capital investment target and only 75% of the new jobs target has been achieved, the company shall repay 40% of the moneys allocated to the capital investment target and 25% of the moneys allocated to the new jobs target.

If the COF is not paid up-front, then the amount to be repaid by the company would be 40% of the amount that it received tied to the capital investment and 25% of the amount that it received for the new jobs.

If a Significant Adverse Event Occurs:

The performance agreement will likely contain a provision that will require a 100% repayment if at any time the locality and/or VEDP conclude that the company will be unable to meet its new jobs and capital investment targets by the stated performance date. Such a conclusion may be based on significant 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.

Demand for Payment:

In the event that the terms of the performance agreement have not been met by the applicable performance period date, VEDP will verify employment, wage, and investment data provided by the company. Upon verification, demand for repayment, if appropriate, will be made by VEDP within thirty (30) days of the date of verification. In most cases, VEDP will first go through the locality to request that the locality attempt to collect all COF funds previously disbursed to the company.

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

Custom Grants:

Collection procedures, where necessary, will vary based on the specific performance agreements and legislation associated with each custom grant on a case-by-case basis.