

TOBACCO REGION OPPORTUNITY FUND
PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** made and entered this ____ day of _____, 20__ (the “Award Date”) by and among the _____ of _____, **VIRGINIA** (the “Locality”), a political subdivision of the Commonwealth of Virginia (the “Commonwealth”), _____ (the “Company”), a _____ [corporation/limited liability company/etc.] [authorized to transact business in the Commonwealth] whose Federal Employer Identification Number is _____, the [**INDUSTRIAL / ECONOMIC DEVELOPMENT AUTHORITY OF _____**] (the “Authority”), a political subdivision of the Commonwealth, and the **TOBACCO REGION REVITALIZATION COMMISSION** (the “Commission”), a political subdivision of the Commonwealth.

WITNESSETH:

WHEREAS, the Virginia General Assembly created the Commission to, among other things, stimulate the economic growth and development of tobacco-dependent communities in the Southern and Southwest regions (the “Region”) of the Commonwealth; and

WHEREAS, the Commission awarded a grant in the amount of \$_____ to the Locality for the benefit of the Company from the Tobacco Region Opportunity Fund (the “Grant”) for the purpose of inducing the Company to undertake the Project (as defined herein); and

WHEREAS, the Commission has determined that the Project will benefit the Region and is consistent with and in furtherance of the Commission’s public purposes; and

WHEREAS, the Company will [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; and

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

WHEREAS, the parties desire to set forth their understanding and agreement as to the payout of the Grant and the obligations of the Company regarding Capital Investment and New Jobs; and

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 \$_____ and will further entail the creation and Maintenance of ____ New Jobs at the Facility; and

WHEREAS, the Commission has determined that the expenditure of the Grant to stimulate the generation of additional tax revenue and economic activity in the Region constitutes a valid public purpose for the expenditure of public funds as outlined in Section 3.2-3100, *et seq.* of the *Code of Virginia* of 1950, as amended, and is the animating purpose for the 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 any new investments the Company promised to make under any other agreement with the Commission. The Capital Investment must be in addition to the capital improvements at the Facility as of the Award Date.

“*Earned Grant Funds*” means the portion of the Grant that is due to the Company pursuant to Section 6 of this Agreement.

“*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 Company’s employment levels (so long as there is active recruitment for open positions), (ii) strikes, and (iii) other temporary work stoppages.

“*Minimum Investment Target*” means the Company’s obligation to make a Capital Investment of at least \$1 million. ***[IF THE CAPITAL INVESTMENT IS LESS THAN \$2 MILLION, THEN THE MINIMUM INVESTMENT TARGET IS HALF OF THE CAPITAL INVESTMENT]***

“*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 \$_____. Average annual wage means the average annual salary of full-time positions at the Facility determined by dividing total payroll (of a type included in W-2 compensation) provided to full-time positions at the Facility by the number of full-time positions at the Facility. 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 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. The New Jobs must be in addition to any new positions the Company promised to make under any other agreement with the Commission. The New Jobs must also be in addition to the full-time jobs at the Facility as of the Award Date, as evidenced by a recent filing with the Virginia Employment Commission.

“*Performance Date*” means the date that is the third anniversary of the Award Date. If the Locality, in consultation with the Authority and the Commission, deems that the Company is making good faith and reasonable efforts to achieve the Targets, the Locality may request an extension of the Performance Date by up to 12 months. Any extension of the Performance Date shall require the prior written approval of the Commission’s Executive Director or his designee. Any further extensions will require the approval of the Commission’s governing body. If the Performance Date is extended, the Commission shall send written notice of the extension to the Authority and the Company, and the date to which the Performance Date has been extended shall be the “Performance Date” for the purposes of this Agreement.

“*Project*” means the Company’s completion and operation of the Facility and satisfaction of the Targets. ***[CUSTOMIZE IF THERE ARE OTHER THINGS IN ADDITION TO JOBS/CAPEX THAT THE COMPANY MUST ALSO DO. E.G., LOCATE CORPORATE HQ]***

“*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 Performance Date.

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

Section 2. Targets.

(a) *Targets:* The Company will complete the Project, including making a Capital Investment of at least \$ _____, and creating and Maintaining at least ____ New Jobs at the Facility, all as of the Performance Date.

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

Section 3. Disbursement of the Grant.

(a) *Disbursement of the Grant in arrears:* After the Performance Date, the Commission will determine the extent to which the Company met or exceeded the Targets as of the Performance Date and the amount of Earned Grant Funds that are due to the Company. Within 30 days thereafter, the Commission will pay to the Locality the Earned Grant Funds. Within 30

days thereafter, the Locality will pay to the Authority, and the Authority will pay to the Company, the Earned Grant Funds.

Section 4. Company Reporting.

(a) *Award Date Report:* Within 30 days of the Award Date, the Company shall provide an Award Date Report in the form attached hereto as **Attachment 1**, that includes a statement of (1) the value of real property and other taxable assets owned by Company at the Facility as of the Award Date (if any), which may be verified by the Locality's Commissioner of Revenue, the Authority and the Commission; and (2) the number of employees of the Company working full-time at the Facility as of the Award Date, as reflected by the Company's report to the Virginia Employment Commission for the quarter ending most recently prior to the Award Date.

(b) *Progress Reporting:* The Company shall provide, at the Company's expense, in the form attached hereto as **Attachment 2**, detailed verification reasonably satisfactory to the Locality, the Authority, and the Commission of the Company's progress on achieving the Targets. Such progress reports will be provided annually, starting on the first anniversary of the Award Date and covering the period through the most recently completed quarter. Further, the Company shall provide such progress reports at such other times as the Locality, the Authority, or the Commission may reasonably require.

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.

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.

(c) *Final Report:* The Company shall provide, at the Company's expense, in the form attached hereto as **Attachment 3**, detailed verification reasonably satisfactory to the Locality, the Authority, and the Commission of the Company's achievement of the Targets. The final report shall be filed within 90 days after the Performance Date.

Section 5. Verification of Targets.

(a) *Verification of Capital Investment:* The Company hereby authorizes the Locality, including the Locality's Commissioner of the Revenue and Treasurer, to release to the Authority and the Commission 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 the Commission solely for verifying satisfaction of the Capital Investment Target. If the Locality, the Commissioner of the Revenue, or 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 the Commission may request.

In addition to the verification data described above, in the sole discretion of the Locality, the Authority, or the Commission, the Locality, the Authority, or the Commission, may each require the Company to provide at its sole expense such other documentation, including invoices, or audits as may be required to properly verify that the Company met or exceeded the Capital Investment Target.

(b) *Verification of New Jobs and Wages:* The Company must submit a copy of its four most recent Employer's Quarterly Tax Reports (Form FC-20) filed with the Virginia Employment Commission with each progress report and its final report. The forms shall be marked and considered confidential and proprietary and shall be used by the Commission solely for verifying satisfaction of the New Jobs Target. The Company expressly grants its consent for the Virginia Employment Commission to release all Company employment records of any kind in its possession to the Commission.

The Company agrees that it will report to the Virginia Employment Commission with respect to its employees at a facility-level, rather than at the company-level.

In addition to the verification data described above, in the sole discretion of the Locality, the Authority, or the Commission, the Locality, the Authority or the Commission, may each require the Company to provide at its sole expense such other documentation or audits as may be required to properly verify that the Company met or exceeded the New Jobs Target.

Section 6. Partial and Full Performance.

(a) *If Minimum Investment Target is Not Met:* The Company must satisfy the Minimum Investment Target by the Performance Date in order to be eligible for any portion of the Grant. If the Minimum Investment Target is not met by the Performance Date, the Commission will not pay any portion of the Grant and this Agreement may be terminated as provided in Section 9(f).

(b) *Allocation of Grant Proceeds:* The Grant is to be allocated as 50% for the Company's Capital Investment Target, and 50% for the Company's New Jobs Target.

(c) *If Minimum Investment Target is Met:* The provisions of this subsection (c) apply only if the Company has met the Minimum Investment Target.

If the Company has not met or exceeded both Targets at the Performance Date, the Commission shall pay to the Locality that part of the Grant that is proportional to the Company's performance toward each Target (the "Earned Grant Funds"). For example, if as of the Performance Date, the Company has attained only 75% of the Capital Investment Target and only 25% of the New Jobs Target, the Commission shall pay to the Locality 75% of the Grant proceeds allocated to the Capital Investment Target, *plus* 25% of the Grant proceeds allocated to the New Jobs Target.

(d) *Full Performance*: If the Commission determines that the Company has met or exceeded both Targets at the Performance Date, the Commission shall pay to the Locality the full amount of the Grant.

Section 7. Revenue Sharing.

Upon receipt of local tax revenue from the Company, the Locality will pay a portion of such revenue to the Commission as provided in the Revenue Sharing Agreement attached to this Agreement as **Exhibit A**.

Section 8. 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, or (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, 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. Such written notices and communications shall be addressed to:

if to the Company, to:

Attention: _____

with a copy to:

Attention: _____

if to the Locality, to:

Attention: _____

with a copy to:

Attention: _____

if to the Authority, to:

Attention: _____

with a copy to:

Attention: _____

if to the Commission, to:

Tobacco Region Revitalization Commission
701 E. Franklin Street, Suite 501
Richmond, Virginia 23219
Attention: Executive Director

with a copy to:

Office of the Attorney General
202 N. 9th Street
Richmond, Virginia 23219
Attention: Counsel to the Tobacco Region
Revitalization Commission

Section 9. Miscellaneous.

(a) *Entire Agreement; Amendments:* This Agreement constitutes the entire agreement among the parties hereto as to the 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 the Commission.

(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, unless the Commission's Executive Director agrees otherwise.

(c) *Counterparts and Electronic Signatures:* 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. Facsimile signatures or signed copies sent by portable document format (PDF) shall be deemed originals.

(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 in connection with litigation arising out of this Agreement, except that the Company, the Locality, and the Authority (subject to receipt of necessary appropriations) shall be responsible for the Commission's costs of collection, including reasonable attorney's fees.

(f) *Termination and Survival:* The Commission, after consultation with the Locality and the Authority, may terminate this Agreement by written notice to all parties in the event that the Company fails (1) to meet the Minimum Investment Target by the Performance Date; (2) to meet its reporting requirements; or (3) to make good faith and reasonable efforts to achieve the Targets prior to the Performance Date. Prior to such termination, the Commission shall provide written notice to the parties of the deficiency. The Authority shall allow the Company 10 business days

from the date of such notice by which the Company may cure the deficiency and thereby avoid termination of this Agreement. In the event of such termination, the Revenue Sharing Agreement between the Locality and the Commission shall remain in effect until the Commission satisfies the repayment obligations to the Locality as provided therein. In the event this Agreement is terminated by the Authority the Company shall not receive any portion of the Grant.

[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: _____

**TOBACCO REGION
REVITALIZATION COMMISSION**

By _____
Name: Evan Feinman
Title: Executive Director
Date: _____

- Attachment 1:** Award Date Report Form
- Attachment 2:** Annual Progress Report Form
- Attachment 3:** Final Report Form
- Exhibit A:** Revenue Sharing Agreement

**AWARD DATE REPORT
TOBACCO REGION OPPORTUNITY FUND**

PROJECT SUMMARY:

| | |
|------------------|--|
| Project | |
| Location | |
| Amount of Grant | |
| Award Date | |
| Performance Date | |

| Jobs as of Award Date | Number |
|---|---------------|
| Employees of Company working full time at the Facility as of the Award Date (<i>attach latest VEC Form FC-20</i>) | |
| | |

| Taxable Assets Owned by Company as of Award Date | Value |
|---|--------------|
| Land associated with the Facility | \$ |
| Land Improvements | \$ |
| Production Machinery and Tools | \$ |
| Furniture, Fixtures and Equipment | \$ |
| Other | |
| | |
| Total | \$ |

TO BE CERTIFIED BY AN OFFICER OF THE COMPANY:

I certify that I have examined this report and to the best of my knowledge and belief, it is true, correct, and complete.

Company Name: _____

Submitted By: _____

Signature: _____

Print Name: _____

Title: _____ Date: _____

**ANNUAL PROGRESS REPORT
TOBACCO REGION OPPORTUNITY FUND**

PROJECT SUMMARY:

| | |
|------------------------------|--|
| Project | |
| Location | |
| Amount of Grant | |
| Performance Reporting Period | |
| Performance Date | |

PROJECT PERFORMANCE:

| Performance Measurement | Target | As of _____ | % Complete |
|---|----------------------------------|--------------------------------------|---------------------------------|
| New Jobs (over _____ baseline)¹ | | | |
| Confidence level target will be reached by Performance Date shown above (check one) | High <input type="checkbox"/> | Moderate <input type="checkbox"/> | Low <input type="checkbox"/> |
| Capital Investment (provide breakdown below)² | | | |
| Confidence level target will be reached by Performance Date shown above (check one) | High <input type="checkbox"/> | Moderate <input type="checkbox"/> | Low <input type="checkbox"/> |
| Average Annual Wage | | | N/A |
| Confidence level target will be reached by Performance Date shown above (check one) | High <input type="checkbox"/> | Moderate <input type="checkbox"/> | Low <input type="checkbox"/> |
| Standard Fringe Benefits (check one) | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A |

¹Data will be verified using Virginia Employment Commission records.

²Data will be verified with locality records.

| Capital Investment Breakdown | Amount |
|-------------------------------------|---------------|
| | |
| Land | \$ |
| Land Improvements | \$ |
| New Construction or Expansion | \$ |
| Renovation or Building Upfit | \$ |
| Production Machinery and Tools | \$ |
| Furniture, Fixtures and Equipment | \$ |
| Other | |
| Total | \$ |

COMMENTS:

Discuss project status, including the current level of new jobs and capital investment, progress on targets, changes or likely changes in project’s nature that may impact achievement of targets, and other information relevant to project performance. If the project is not on track to meet targets, please provide an explanation.

TO BE CERTIFIED BY AN OFFICER OF THE COMPANY:

I certify that I have examined this report and to the best of my knowledge and belief, it is true, correct, and complete.

Company: _____

Submitted By: _____
Signature of Official

Name: _____
Print Name

Title: _____

Date: _____

**FINAL REPORT
TOBACCO REGION OPPORTUNITY FUND**

PROJECT SUMMARY:

| | |
|------------------|--|
| Project | |
| Location | |
| Amount of Grant | |
| Performance Date | |

PROJECT PERFORMANCE:

| Performance Measurement | Target | As of _____ | % Complete |
|--|---------------|--------------------|-------------------|
| New Jobs (over ___ baseline) ¹ | | | |
| Capital Investment (provide breakdown below) ² | | | |
| Average Annual Wage | | | N/A |
| Standard Fringe Benefits | | | |

| Capital Investment Breakdown | Amount |
|-------------------------------------|---------------|
| Land | \$ |
| Land Improvements | \$ |
| New Construction or Expansion | \$ |
| Renovation or Building Upfit | \$ |
| Production Machinery and Tools | \$ |
| Furniture, Fixtures and Equipment | \$ |
| Other | |
| Total | \$ |

¹Data will be verified using Virginia Employment Commission records.

²Data will be verified with locality records.

COMMENTS:

[Discuss Project status or the importance of the Project to the locality and region.]

TO BE CERTIFIED BY AN OFFICER OF THE COMPANY:

I certify that I have examined this report and to the best of my knowledge and belief, it is true, correct, and complete.

Company: _____

Submitted By: _____
Signature of Official

Name: _____
Print Name

Title: _____

Date: _____

Exhibit A

Revenue Sharing Agreement

This **REVENUE SHARING AGREEMENT** (“Agreement”) made and entered into this the ____ day of ____, 20__ (“Effective Date”) by and between the [**CITY/COUNTY/TOWN OF _____, VIRGINIA**] (the “Locality”), a political subdivision of the Commonwealth and the **TOBACCO REGION REVITALIZATION COMMISSION**, a body corporate and political subdivision of the Commonwealth of Virginia (the “Commission”).

WITNESSETH:

WHEREAS, the parties entered into the Performance Agreement dated as of _____ (“Performance Agreement”) to which this Agreement is attached pursuant to which the Commission will make a Grant to the Locality that the Locality will use to induce the Company to undertake the Project, thereby making a Capital Investment and creating New Jobs in the Locality; and

WHEREAS, if the Project is completed, the Locality will realize additional Local Tax Revenue and desires to share a portion of that Local Tax Revenue with the Commission:

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.

1. Definitions: Capitalized terms used but not defined in this Agreement have the same definitions as set forth in the Performance Agreement.

“*Local Taxes*” means the tax payments the Locality receives from the Company as a result of local assessments (including any entities owned by, affiliated with, or under common control with the Company) pursuant to Title 58.1, Subtitle III of the Code of Virginia, including, but limited to, real property taxes, business, professional and occupational license taxes, machinery and tools taxes, and tangible personal property taxes.

“*New Tax Revenue*” means the sum of Local Taxes generated in connection with or attributable to the Project that the Company pays to the Locality, directly or indirectly. If the Project involves the expansion of the Facility or the Company’s operations in the Locality, the New Tax Revenue for a given tax year is the amount of Local Taxes the Company paid in excess of the amount of Local Taxes the Company paid for the tax year immediately preceding the date of the Performance Agreement. (For example, if the Performance Agreement is dated 2020, the Company paid \$50,000 of Local Taxes in 2019, and the Company paid \$75,000 of Local Taxes in 2021, the New Tax Revenue for 2021 would be \$25,000.)

2. Revenue Sharing: Starting with the first tax year that begins after the Award Date of the Performance Agreement, the Locality will pay to the Commission an amount equal to 5% of the

New Tax Revenue (“Revenue Sharing Payments”). The Locality will make Revenue Sharing Payments within 45 days after the Locality receives Company’s payment of its Local Taxes.

3. Payment Period: The Locality will continue to pay Revenue Sharing Payments to the Commission until the total amount of Revenue Sharing Payments the Locality has paid to the Commission equals 105% of the Earned Grant Funds.

The Locality’s obligation to pay Revenue Sharing Payments is contingent upon its receipt of tax payments from the Company and is subject to the Locality’s receipt of appropriations sufficient to make such payments. The Locality’s chief executive officer agrees to use his or her best efforts to secure the necessary appropriations.

4. Commission Reimbursement to Locality: In the event Company does not meet its Targets in full, the Commission shall reimburse to the Locality within 120 days of the Performance Date, as defined in the Performance Agreement and as applicable, the amount of Revenue Sharing Payments received by the Commission from the Locality that exceed 105% of Earned Grant Funds.

5. Incorporation by Reference: Sections 8 (Notices) and 9 (Miscellaneous) of the Performance Agreement are hereby incorporated by reference into this Agreement.

**TOBACCO REGION
REVITALIZATION COMMISSION**

By: _____

Evan Feinman, Executive Director

Date: _____

[LOCALITY]

By: _____

Title: _____

Date: _____