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June 30, 2022

By Email and FedEx

The Honorable Richard K. Delmar
Deputy Inspector General
Office of Inspector General
U.S. Department of the Treasury
1500 Pennsylvania Avenue
Washington, D.C. 20220
delmarr@oig.treas.gov

Re: Yellow Corporation f/k/a YRC Worldwide Inc.

Dear Deputy Inspector General Delmar:

We represent Yellow Corporation f/k/a YRC Worldwide Inc. ("Yellow") in connection with the Select Subcommittee on the Coronavirus Crisis' ("Committee") investigation into Yellow's CARES Act loan.[1] We write to respond to Chairman James E. Clyburn's April 27, 2022 letter to you requesting that the Treasury Department's Office of Inspector General ("OIG") investigate whether Yellow violated the False Claims Act or other federal laws in connection with its application for a CARES Act loan, and to point out material inaccuracies in the annexed Committee staff report ("Report").

Yellow notes that, in conducting its inquiry, the OIG is tasked to provide the Secretary of Treasury with an independent and objective review of the department's operations. The OIG's independence and objectivity are particularly critical here given that, from its outset, the Committee's investigation has been highly partisan and appears to have been designed to score political points against the former administration at Yellow's

[1] Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136 (2020) § 4003.

expense, notwithstanding the fact that Yellow has also worked seamlessly with the current administration to administer the loan.

Indeed, any objective, non-partisan assessment of the Committee's referral will show that Yellow was transparent with Treasury throughout the CARES Act loan application process and did not make any false statements in connection with its application. Not only are the Committee's allegations of improper conduct against Yellow unfounded, the Committee has in its possession evidence – much of which was voluntarily provided by Yellow pursuant to the Committee's requests – that refutes them. Yellow is thus compelled to set the record straight so that the OIG is properly informed of the facts related to Yellow's loan application and its use of loan proceeds.

I. Treasury's CARES Act Loan to Yellow Saved 30,000 Jobs and Helped Maintain the Nation's Vital Supply Chains

On April 24, 2020, facing crippling economic harm caused by the COVID-19 pandemic that threatened its continued existence as a going concern, Yellow applied for a CARES Act loan under Section 4003(b)(3) thereof in an amount that was approximately 4% of the $17 billion in funds that Congress had earmarked for the program.[2] In connection with its efforts to save approximately 30,000 jobs, including those of 24,000 hard-working members of the International Brotherhood of Teamsters, Yellow worked diligently, and hand-in-hand with senior union leadership, to garner support for its loan application, and, in fact, received broad support from numerous Members of Congress on both sides of the aisle who urged Treasury to approve Yellow's application. Ultimately, on June 30, 2020, after extensive diligence, and after the Department of Defense agreed that Yellow was critical

[2] As an example of disappointing political gamesmanship, the Committee disingenuously continues to highlight that Yellow received 95% of the funds dispersed under Section 4003(b)(3) without acknowledging that Yellow applied for only 4% of those funds, and thus, far more funds were available and no other qualifying company failed to receive Section 4003(b)(3) funding because of Yellow's loan.

to national security, Treasury approved Yellow's loan application.

During an unprecedented crisis, Yellow's CARES Act loan ensured that the company had the necessary liquidity to enable its drivers and other employees to remain working day and night on loading docks, in freight depots and on America's highways to provide uninterrupted delivery of military supplies, personal protective equipment, household goods, medicine, food, and other necessities. It also enabled Yellow to fulfill its role as a critical link in numerous supply chains throughout the country, and, in 2020 alone, to complete more than 17 million freight shipments, including hundreds of thousands of shipments for the Department of Defense.

II. The Committee's False Allegations and the Facts

Despite Yellow's voluntary, good-faith efforts to cooperate with the Committee, including by producing extensive documentary evidence in response to the Committee's document requests, Chairman Clyburn and the majority staff continue to make unsubstantiated allegations concerning Yellow's eligibility for and use of its CARES Act loan funds. As the materials provided to the Committee establish, however, Yellow's eligibility for and use of its CARES Act funds is, was, and continues to be, appropriate in every respect.

In its referral, the Committee's principal allegations of purported improprieties are that: (i) Yellow deceived Treasury about its intended use of some of the loan funds for capital investment in new trucks, trailers, and other equipment rather than to offset losses caused by the COVID-19 pandemic; (ii) Yellow mischaracterized the nature of a then-pending lawsuit with the Department of Defense in its communications with Treasury; and (iii) Yellow misrepresented the percentage of the less-than-truckload ("LTL") shipping services it provided to the Department of Defense. Beyond the referral allegations, the Committee falsely describes the loan features, including, for example, stating that the loan agreement did not provide Treasury with adequate security.

We address these allegations and inaccuracies below.

Use of Loan Proceeds. Yellow was transparent with Treasury from the inception of the loan application process about its intended use of the loan proceeds, including about its intended use of substantial loan proceeds to fund capital investment. In its application, Yellow sought $365 million for "capital investment required to replenish the fleet and modernize the technology infrastructure." The Report, however, fails to note that Treasury, during its extensive due diligence, established that Yellow's capital investment plan for 2020 had been in place before Congress passed the CARES Act, and that, due to projected losses resulting from the COVID-19 pandemic, Yellow would be unable to make its planned capital investment absent receipt of the requested loan proceeds.[3]

The Report also ignores that Treasury required Yellow to devote a significant percentage of the loan proceeds to capital investment -- in fact, this is the only permitted use of the $400 million Tranche B loan proceeds.[4] This requirement mitigated Treasury's loan risk in at least two significant ways. First, Treasury took a first-lien position on the new trucks and trailers Yellow purchased with the loan proceeds earmarked for capital investment. Second, the approved capital investments funded Yellow's conversion from a fleet predominantly comprised of older leased trucks and trailers to a newer fleet predominantly owned by Yellow. The new trucks and trailers enabled Yellow to reduce its maintenance and fuel costs, improve operational performance and productivity and lower emissions. Yellow's transformation to a safer, greener, less costly and more efficient operator increased the likelihood that Yellow would be able to pay loan interest, repay the loan principal and increase the value of Treasury's equity stake in Yellow. Notably, the Report fails to mention that, since loan inception, Yellow has implemented a significant portion of the strategy to return to

[3] *See* Transcript of Feb. 16, 2022 Interview of Adam Lerrick, former Counselor to the Secretary of the Treasury ("Lerrick Tr."), at 54:1310-55:1336.

[4] *See, e.g., id.* at 49:1186-89.

strong profitability and has steadily improved its financial performance while doing so, Treasury's equity stake has increased in value by more than 60%, and Yellow has already paid Treasury more than $48.9 million in cash and PIK interest.

The Report also intimates, without support, that undue political pressure late in the negotiation process resulted in Treasury increasing the capital expenditure component of the loan to Yellow. The Committee's unsubstantiated speculation, however, overlooks the fact that the loan was extensively negotiated at arms' length for weeks and that, *before* Treasury provided the revised proposal to Yellow with the increased capital expenditure component which is identified in the Report, Yellow delivered a detailed explanation to Treasury that reconciled the requested capital expenditure amount with Yellow's lower amounts of spending in prior years.[5]

The Report also fails to mention that, after the loan was approved, Yellow had to account for, and Treasury had to approve, every dollar spent. Yellow's receipt of loan proceeds was conditioned on its submission of disbursement requests stating with specificity how every dollar and cent would be spent, and Treasury had to approve these requests and authorize the disbursements each time before Yellow received any funds from the loan administrator. Yellow worked with Treasury officials under both the prior and existing presidential administrations, and it appreciates the rigor of the process and the professionalism of the men and women at Treasury who were involved.

At bottom, the Committee has not identified any improprieties with Yellow's use of Treasury funds for any purpose, including capital spending, and Yellow has not made, and the Committee has not identified, any misrepresentations by Yellow to Treasury concerning its need for or intended use of CARES Act loan funds.

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[5] *See* June 18, 2020 email from Yellow's counsel to Adam Lerrick.

False Claims Act Lawsuit. The Report alleges that Yellow, when seeking the loan, mischaracterized the nature of a then-pending lawsuit brought against Yellow by the Department of Justice on behalf of the Department of Defense. The sole "support" offered by the Committee for this allegation is an email from Treasury to Yellow during the due diligence process inquiring about the "status" of the lawsuit, in response to which Yellow's counsel informed Treasury that it "is a contractual dispute which originated in 2008, and a motion to dismiss has been pending for 10 months."

The Committee's report, however, omits that on June 28, 2020, Yellow provided Treasury, as part of Treasury's formal legal due diligence request, the following case description:

> **USA, ex rel. James Hannum (DoD Negative Weight Corrections).** On December 12, 2018, the US Government on behalf of the Department of Defense (DOD) and the original whistleblower complainant, James Hannum, filed an intervening complaint against YRCF ***alleging fraud and violations of the False Claims Act.*** The company filed a motion to dismiss and a motion to change venue on February 22, 2019. The government filed a response and the Company filed its reply to their response on March 20, 2019. The Court asked for oral arguments on the motions. The Court heard the parties' arguments on August 12, 2019 and a decision is pending. (emphasis added)

Indeed, the Committee's bad faith claim of deception is further undercut by the fact that, beyond telling them directly that this was a False Claims Act case, this was a public lawsuit on the public record brought by the Department of Justice. Moreover, the Report makes no mention of the fact that Treasury, as part of its due diligence, also reviewed Yellow's 2020 Form 10-K Annual Report, which contains a detailed description of the lawsuit; or that, upon learning of the existence of the lawsuit, Treasury's general counsel's office reached out directly to the Department of Justice to discuss the matter.[6] Accordingly, any

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[6] *See* Lerrick Tr. 32:761-766, 33:793:800.

suggestion that Yellow somehow misled Treasury - or that Treasury was unaware of the nature and details of the suit, which Yellow settled in March 2022 without any finding or admission of liability and for only a small fraction of the damages sought by the Department of Defense - is demonstrably false.

Department of Defense Certification. The Report also falsely alleges that, in seeking the loan, Yellow misrepresented that it was responsible for 68% of Department of Defense LTL shipments. At the time Yellow was applying for its loan, the available information it had about the Department of Defense's overall LTL shipping volume was derived from LTL shipment data provided by the Department of Defense in response to Yellow's Freedom of Information Act requests. Based on that information, Yellow, at the time, was shipping approximately 68% of the Department of Defense's LTL voluntary tenders.

Rather than rely on, much less properly consider, Yellow's significant volume of Department of Defense's LTL voluntary tender shipments, the Committee essentially ignores them. Instead, as purported support for this allegation, it relies exclusively on information provided by Crowley Logistics ("Crowley"), a competitor of Yellow that acts under contract as a freight broker for the Department of Defense. Notably, when considering Yellow's eligibility for the loan, USTRANSCOM admitted that the government did not verify any of the "estimations" provided by Crowley and acknowledged that, because Crowley is a contractor, "the Government should not rely solely on their estimation" of Yellow's importance to the Department of Defense.[7]

Notwithstanding USTRANSCOM's admission that Crowley's shipment numbers had not been verified, and recommendation that Crowley not be treated as a sole source regarding Yellow's total shipments for the Department of Defense, the Report bases its erroneous conclusions about Yellow's lack of criticality to the Department of Defense solely on Crowley's estimates. However, Yellow's CEO, in a June 10, 2022 letter to the Committee,

[7] *See* Report Endnote No. 42 at p. 41.

explained that the freight it handles for Crowley represents only approximately a quarter of Yellow's total Department of Defense business, and that, from March 2020 through February 2021, only 25.2% of its Department of Defense LTL shipments were sourced through Crowley. The remainder, equal to 144,669 additional shipments, comprising approximately 68% of the Department of Defense's voluntary tender volume, were based on voluntary tenders submitted by Yellow to the Department of Defense. The Report thus ignores that Yellow's Crowley-sourced Department of Defense shipments accounted for approximately only one out of every four shipments Yellow was delivering for the Department of Defense, and that Crowley's calculation of Yellow's percentage carry of Department of Defense shipments is grossly underestimated.

In any case, the Committee cannot credibly maintain that, in making its determination about Yellow, anything Yellow did or said misled the Secretary of Defense in making his ultimate determination. Indeed, at the outset of a global pandemic where supply chains worldwide were under extraordinary stress, no one was in a better position to understand the total LTL shipment needs of the Department of Defense, and to assess Yellow's mission criticality, than the Department of Defense itself. This includes how the loss of Yellow's capacity to transport hundreds of thousands of shipments annually might adversely affect the Department of Defense, and how the total loss of Yellow's ability to ship the millions of other shipments it completes each year might adversely affect numerous other key supply chains.

Adequate Security and Other Loan Features. The Report also misstates features of the loan agreements. As an example, it alleges that Yellow's loan was inadequately secured because Treasury allegedly charged a below-market interest rate and received a junior lien on Yellow's existing assets that was subordinate to Yellow's other creditors. The Report, however, (i) ignores that Treasury received, as added taxpayer protection, an approximately 30% ownership interest in Yellow valued today at approximately $48 million, (ii) dismisses the fact that Treasury received first-priority liens on all equipment Yellow purchased with the loan proceeds, and (iii) ignores the fact that Yellow's assets before the loan was issued were worth $440 million more than their liabilities, making Treasury more than adequately secured on the $300 million in junior lien loans. Moreover, the Committee overlooks that while thousands of companies and millions of Americans received much-needed help during the COVID-19 pandemic that has been forgiven by the US government, Yellow - a proud American company employing thousands of US citizens that was dramatically impacted by the pandemic just as these companies and citizens were - will repay this loan in full and is on track to do so by the maturity date.

In any event, Yellow has not made, and the Committee has not identified, any false statements or misrepresentations by Yellow to Treasury concerning how the loan was to be secured, priced or collateralized.

* * *

Yellow acted properly at all times in connection with its CARES Act loan application and has met, and continues to meet, all of its obligations under the loan. The Committee's Report has not identified *any* misrepresentations made by Yellow, let alone material misrepresentations that might warrant an investigation by the OIG or give rise to potential liability under the False Claims Act. In fact, stripped of partisan bias and laid bare under an objective lens, it is evident that the Committee's allegations against Yellow are demonstrably false and divorced from reality.

We are available should you wish to discuss this matter, or if you require additional information. Thank you in advance for your time and attention.

Sincerely,

Marc E. Kasowitz