

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 11096 / August 26, 2022

SECURITIES EXCHANGE ACT OF 1934
Release No. 95612 / August 26, 2022

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 4329 / August 26, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-21009

In the Matter of

MARK C. KELLY, CPA

Respondent.

**ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933, SECTIONS 4C AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
AND RULE 102(e) OF THE
COMMISSION’S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Mark C. Kelly, CPA (“Kelly” or “Respondent”) pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) and Sections 4C¹ and 21C of the Securities Exchange Act of 1934 (“Exchange

¹ Section 4C provides, in relevant part, that:

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others; (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder.

Act”), and Rule 102(e)(1)(iii) of the Commission’s Rules of Practice.²

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 4C and 21C of the Securities Exchange Act of 1934, and Rule 102(e) of the Commission’s Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds³ that:

A. SUMMARY

1. This case arises out of Kelly’s involvement in improper earnings management practices during the period from December 2016 through April 2018 (the “relevant period”) while he was Controller and Chief Accounting Officer of PPG Industries, Inc. (“PPG”), a manufacturer of paint and other specialty industrial, automotive, and architectural coating materials. During the relevant period, Kelly was responsible for PPG’s corporate financial planning and analysis (“FP&A”) as well as its external financial reporting and accounting, with authority over subordinates in both areas. Kelly had regular access to information about PPG’s projected earnings and earnings per share (“EPS”) results, and tracked whether there would likely be a gap between these preliminary results and analysts’ consensus EPS estimates.⁴ Kelly also had authority during

² Rule 102(e)(1)(iii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

³ The findings herein are made pursuant to Respondent’s Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

⁴ For most of the relevant reporting periods, analysts’ EPS estimates used PPG’s Adjusted EPS, a non-GAAP metric that is based on adjusted income from continuing operations. Accordingly, PPG used Adjusted EPS in its internal projections and announced it in most of its earnings releases.

the relevant period over the staff of the Controller's division responsible for making accounting entries that affected PPG's earnings results. During the relevant period, Kelly instructed certain of these employees to make, modify or omit certain accounting entries based in part on whether those entries enabled PPG to meet or come closer to analysts' consensus EPS estimates.

2. Kelly directed his staff to delay recording or not to record certain expense accruals, and to misclassify certain income as from continuing operations, in a manner inconsistent with generally accepted accounting principles ("GAAP"). In so doing, Kelly took advantage of PPG's insufficient internal accounting controls, and circumvented PPG's policies and procedures that were designed to ensure appropriate financial reporting and disclosure. As a result, PPG materially overstated its income from continuing operations in its published financial results for the years ended December 31, 2016 and December 31, 2017, and for certain quarters within that period. PPG included these improper financial results in press releases and its filings with the Commission.

3. Kelly made similar improper accounting decisions in the first quarter of 2018, and, as a result, PPG's books and records contained inaccuracies during the closing period for that quarter. However, PPG initiated an investigation after one of Kelly's indirect subordinates submitted a complaint through PPG's internal hotline, in mid-April 2018. PPG subsequently recorded adjustments to correct the inaccuracies in its books and records before publicly disclosing its financials in its earnings release for the first quarter of 2018.

4. In addition, on June 28, 2018, PPG restated its financial statements for the relevant period (the "Restatement"). The Restatement disclosed certain of the improper accounting entries caused by Kelly, as described above, among other unrelated items. PPG also identified a material weakness in PPG's internal control over financial reporting.

5. Based on the foregoing and the conduct described below, Kelly violated Section 17(a)(3) of the Securities Act and Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder, and aided and abetted PPG's violations of Sections 17(a)(2) of the Securities Act and Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder.

B. RESPONDENT

6. **Kelly**, 62, resides in Prosper, Texas. Beginning in September 2013, Kelly served as PPG's Vice President and Controller. Beginning on March 1, 2017, Kelly was also PPG's Principal Accounting Officer. Kelly was terminated on May 10, 2018. During the relevant period, Kelly held an active Certified Public Accountant ("CPA") license in the Commonwealth of Pennsylvania, and he is currently a licensed CPA in Utah.

C. RELEVANT ENTITY

7. **PPG** is a Pennsylvania corporation based in Pittsburgh, PA. PPG's securities are registered with the Commission under Section 12(b) of the Exchange Act and trade under the symbol "PPG" on the New York Stock Exchange. PPG files periodic reports, including Forms 10-

K and 10-Q, with the Commission pursuant to Section 13(a) of the Exchange Act and related rules thereunder. In February 2018, PPG completed two notes offerings totaling \$1 billion. The preliminary prospectus supplement, dated February 22, 2018 and filed with the bond offerings, noted that the financial information provided therein should be read in conjunction with PPG's Form 10-K for 2017, which it incorporated by reference. In addition, during the relevant period, PPG issued securities to its employees pursuant to several securities-based compensation programs pursuant to Form S-8, which also incorporated PPG's filings within the relevant period by reference. On September 26, 2019, the Commission instituted settled cease-and-desist proceedings against PPG. *In the Matter of PPG Industries, Inc.*, Rel. No. 33-10701 (Sept. 26, 2019).

D. FACTS

Background

8. During the relevant period, Kelly, along with other senior managers at PPG, closely monitored PPG's internal projected earnings and EPS, and analysts' consensus estimates of the same, in order to forecast whether PPG's reported financials would meet or fall short of analysts' estimates. Kelly, along with others at PPG, also identified and tracked, throughout the quarter, certain accounting items that had the potential to move earnings positively or negatively. In order to assist these tracking efforts throughout the quarter, Kelly supervised his subordinates in maintaining a document called the "Latest View" report, which included PPG's projected EPS, analysts' consensus estimates, and a running list of "Risks and Opportunities"—certain open accounting items that, depending on how they were handled, could affect PPG's earnings, either positively or negatively. At the end of this Risks and Opportunities list was a line item, "Gap," to indicate the earnings difference that remained between PPG's internal estimates and analysts' consensus estimate. Kelly also tasked PPG finance staff with finding "good guys" (*i.e.*, items that would positively affect earnings) or "bad guys" (*i.e.*, items that would negatively affect earnings).

9. In certain instances, detailed below, Kelly instructed his subordinates to make or omit accounting entries for the items on the Risks and Opportunities list or from other sources based on his awareness that these accruals could impact PPG's ability to meet or come closer to consensus estimates.

EPS Management in 2016 and 2017

10. Kelly's involvement in earnings management began in the fourth quarter of 2016, but intensified in mid-2017, and continued through early 2018, as PPG was experiencing sustained pressure on its earnings from a challenging business environment.

11. For example, on May 26, 2017, during the second quarter of 2017, Kelly emailed a senior PPG officer at his request a copy of the current Latest View report for the quarter. The report indicated that PPG's internal EPS projection was \$1.76, and that consensus EPS was \$1.85; the Risks and Opportunities list identified the resulting gap between those two figures, as well as a list of open accounting items that could affect that gap. In his email, Kelly told the officer that he was "working to close the gap." Later, in a June 8, 2017 email, Kelly discussed the second quarter forecast with a subordinate in the FP&A division who had access to both PPG's EPS projections and analysts' consensus projections. After learning from the subordinate that it was "safe for now to target \$1.83 instead of \$1.85," because analysts' estimates were decreasing, Kelly stated that they needed to "find" \$6 million—the updated gap between PPG's earnings projections and current consensus estimates. Kelly gave the subordinate further instructions for how to close the gap, including to reach out to Kelly's direct reports in the Controller's division.

12. Late in the closing process for the second quarter of 2017, and shortly after the preliminary business results became available, as a result of Kelly's involvement, entries related to four items from the Risks and Opportunities list were improperly made or omitted from quarterly reporting. Around the same time, Kelly informed a senior PPG officer that he was continuing to work to meet EPS targets: late in the afternoon of July 7, 2017, Kelly informed a senior PPG officer that "we can be at either \$1.83 or \$1.84 for EPS," and set up a meeting to discuss the "options."

13. In total, for the second quarter of 2017, at Kelly's direction, inappropriate accounting entries were made for five items that caused PPG to overstate its income from continuing operations by a total of over \$10 million in its Form 10-Q. PPG ultimately filled the gap Kelly had earlier identified and converted an earnings "miss" of several pennies into an earnings "make."

14. The contemporaneous impact of the accruals with which Kelly was involved on PPG’s reporting in the four quarters that are the subject of this Order is shown in the table below:

	Q4 2016	Q2 2017	Q3 2017	Q4 2017
Overstatement of Pre-Tax Income (millions)	\$6.8 ⁵	\$10.34	\$2.33	\$4.7
Analysts’ Consensus EPS	\$1.19	\$1.83	\$1.53	\$1.18
EPS (or Adjusted EPS) as Originally Announced ⁶	\$1.19	\$1.83	\$1.52	\$1.19
Estimated EPS (or Adjusted EPS) without entries with which Kelly was involved	\$1.16	\$1.80	\$1.51	\$1.17

EPS Management in the First Quarter of 2018

15. During the first quarter of 2018, on March 6, 2018, Kelly sent the supervisor responsible for financial reporting at PPG an email asking him to “chase down” “Q1 Good Guys,” including any positive adjustments to PPG’s healthcare claims reserve. Later, on March 20, 2018, Kelly, noting that “[w]e are very close to Q1 2018 EPS consensus,” pressed business managers in an email to make every effort, “no matter how small,” to identify accruals to meet consensus EPS estimates.

16. As the end of the quarter neared, Kelly, along with others at PPG, closely monitored PPG’s EPS projections, analysts’ consensus EPS estimates, and the potential gap between them. On March 27, 2018, Kelly emailed a senior PPG officer stating that PPG’s projected EPS was four cents short of analysts’ consensus estimates, and noted he would “be able to find two pennies but four cents will be a challenge.” On March 29, 2018, Kelly informed a number of staff members, including business unit managers and subordinates in the Controller’s division, that PPG’s projected earnings were approximately \$5 million short of consensus estimates. He informed some of his subordinates, around the same time, that he was looking to make up for some of this gap with about \$1 million in entries that the Controller’s division had not yet booked. Kelly also told an officer of one of PPG’s global regions that he was “[l]ooking for some help of around \$1MM from the region” on income for the first quarter, and asked him to have his business units consider “small accruals (\$20,000-\$50,000) that could be recorded” in the following quarter.

17. Consistent with the forgoing, late in the first quarter of 2018 and, in particular, late in the closing process, as a result of Kelly’s instructions, several accruals that PPG typically

⁵ This amount does not include a \$3.4 million improper entry which had no impact to pre-tax income from continuing operations. However, it did impact adjusted income from continuing operations and, accordingly, the Company’s Adjusted EPS.

⁶ For each quarter during the relevant period, except the third quarter of 2017, PPG announced in its earnings release its Adjusted EPS. In the third quarter of 2017, PPG made no adjustments to its income from continuing operations and announced only its GAAP EPS.

made and that were required by GAAP were improperly omitted or reduced, and increased PPG's apparent continuing income by \$3.18 million.

18. On the afternoon of April 5, 2018, as the quarter closing process continued, Kelly emailed a senior PPG officer to ask: "Where do you want to land for EPS? I can get to \$1.41." At the time, Kelly and other PPG senior officers expected consensus EPS would be either \$1.39 or \$1.40, and Kelly understood that the current results were showing that PPG would land at \$1.41. The officer responded, "Hitting consensus would be sufficient." Several hours later, Kelly instructed his subordinates not to record a \$2.2 million positive adjustment to income that already had been prepared and that, according to PPG's practices and under the circumstances, should have been made.

Investigation and Restatement

19. On or about April 16, 2018, shortly before PPG was to release its earnings report for the first quarter of 2018, certain of the improper entries discussed above were reported to PPG's internal hotline system. On April 19, 2018, PPG disclosed in a press release that it had identified certain understated expenses for the first quarter of 2018, corrected them prior to the press release, and that it was conducting an internal investigation into the matter. Certain of the improper accounting entries discussed above were initially included in PPG's books and records for the first quarter of 2018, but, as a result of the investigation, were ultimately correctly booked and reflected in PPG's Form 10-Q for that quarter.

20. On June 28, 2018, PPG filed its Form 10-Q for the first quarter of 2018 and an amended Form 10-K for 2017 (the "Restatement"), which restated, among other things, PPG's previously issued financial statements for 2016 and 2017 and quarterly results for the fourth quarter of 2016 through the fourth quarter of 2017. The Restatement disclosed the misstatements described above and certain inadvertent errors detected over the course of the internal investigation.

21. PPG also disclosed in its Restatement that its internal control over financial reporting suffered from a material weakness because the Company did not maintain effective controls within its financial close process. PPG stated that Kelly directed his subordinates to improperly override PPG's internal controls, and that these actions were not disclosed to others in senior management or PPG's auditor. PPG stated further that these actions often occurred during the financial closing process and tended to have a positive impact on earnings for the relevant reporting period.

Findings

22. Based on the foregoing, the Commission finds that:

- a. Kelly willfully aided and abetted and caused PPG's violations of Section 17(a)(2) of the Securities Act which proscribes, in the offer or sale of a security, obtaining "money or property by means of any untrue statement of a material fact

or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.”⁷

b. Kelly willfully violated Section 17(a)(3) of the Securities Act which proscribes, in the offer or sale of a security, engaging “in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.”

c. Kelly willfully violated Section 13(b)(5) of the Exchange Act, which provides: “No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2)” of Section 13(b).

d. Kelly willfully violated Rule 13b2-1 under the Exchange Act, which prohibits any person from directly or indirectly falsifying or causing to be falsified, any book, record, or account subject to Section 13(b)(2)(A).

e. Kelly willfully aided and abetted and caused PPG’s violations of Section 13(a) of the Exchange Act and Rules 13a-1, 13a-11, 13a-13 and 12b-20 thereunder, which require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission information, documents, and annual and quarterly reports as the Commission may require, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading.

f. Kelly willfully aided and abetted and caused PPG’s violations of Section 13(b)(2)(A) of the Exchange Act, which requires issuers with securities registered under Section 12 of the Exchange Act to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the issuer; and

g. Kelly willfully aided and abetted and caused PPG’s violations of Section 13(b)(2)(B) of the Exchange Act, which requires issuers with securities registered under Section 12 of the Exchange Act to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles.

⁷ “Willfully,” for purposes of imposing relief under Section 4C(a)(3) of the Exchange Act and Rule 102(e)(1)(iii), “means no more than that the person charged with the duty knows what he is doing.” *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Kelly's Offer.

Accordingly, it is hereby ORDERED, pursuant to Section 8A of the Securities Act, Sections 4C and 21C of the Exchange Act, and Rule 102(e) of the Commission's Rules of Practice, effective immediately, that:

A. Kelly shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act and Sections 13(a), 13(b)(2)(A), 13(b)(2)(B) and 13(b)(5) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, 13a-13, and 13b2-1 promulgated thereunder.

B. Kelly is denied the privilege of appearing or practicing before the Commission as an accountant.

C. Kelly shall pay civil penalties of \$100,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

Payment shall be made in the following installments: (1) Within ten (10) days of the entry of this Order, Respondent will pay \$50,000; (2) Within ninety (90) days of the entry of this Order, Respondent will pay \$12,500; (3) Within one hundred and eighty (180) days of the entry of this Order, Respondent will pay \$12,500; (4) Within two hundred and seventy (270) days of the entry of this Order, Respondent will pay \$12,500; and (5) Within three hundred and sixty (360) days of the entry of this Order, Respondent will pay the remainder due, as described below.

Payments shall be applied first to post-Order interest, which accrues pursuant to 31 U.S.C. § 3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-Order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Mark C. Kelly as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Thomas P. Smith, Jr., Division of Enforcement, Securities and Exchange Commission, 100 Pearl Street, Suite 20-100 New York, New York 10004-2616.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree

or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Vanessa A. Countryman
Secretary