

SECURITIES AND EXCHANGE COMMISSION

Investment Company Act Release No. 33868; File No. 812-15076

Sutter Rock Capital Corp.

May 19, 2020

AGENCY: Securities and Exchange Commission (“Commission”).

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the “Act”) for an exemption from sections 23(a), 23(b) and 63 of the Act; under sections 57(a)(4) and 57(i) of the Act and rule 17d-1 under the Act permitting certain joint transactions otherwise prohibited by section 57(a)(4) of the Act; and under section 23(c)(3) of the Act for an exemption from section 23(c) of the Act.

Summary of the Application: Sutter Rock Capital Corp. (“Applicant” or “Company”) requests an order that would permit Applicant to (i) issue restricted shares of its common stock (“Restricted Shares”) as part of the compensation package for certain of its employees, officers and all directors, including non-employee directors (the “Non-Employee Directors”¹), through its Amended and Restated 2019 Equity Incentive Plan (the “Amended Equity Incentive Plan” or the “Amended Plan”), (ii) withhold shares of the Applicant’s common stock or purchase shares of Applicant’s common stock from Participants to satisfy tax withholding obligations relating to the vesting of Restricted Shares or the exercise of options to purchase shares of Applicant’s common stock (“Options”) that were granted pursuant to the Initial Equity Incentive Plan (defined below)

¹ Employees, officers, and all directors, including Non-Employee Directors, are collectively the “Participants.”

or will be granted pursuant to the Amended Equity Incentive Plan,² and (iii) permit Participants to pay the exercise price of Options that were granted pursuant to the Initial Equity Incentive Plan or will be granted to them pursuant to the Amended Equity Incentive Plan with shares of Applicant's common stock.

Applicant: Sutter Rock Capital Corp.

Filing Dates: The application was filed on October 25, 2019, and amended on February 27, 2020, May 1, 2020, and May 18, 2020.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at Secretarys-Office@sec.gov and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on June 15, 2020, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at Secretarys-Office@sec.gov.

ADDRESSES: The Commission: Secretarys-Office@sec.gov. Applicant: One Sansome Street, Suite 730, San Francisco, CA 94104.

FOR FURTHER INFORMATION CONTACT: Jill Ehrlich, Senior Counsel, at (202) 551-6819, or Daniele Marchesani, Assistant Chief Counsel, at (202) 551-6821 (Division of Investment Management, Chief Counsel's Office).

² Options will not be granted to Non-Employee Directors, and therefore, no relief is sought in the application for the grant of Options.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission’s website by searching for the file number, or for the applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

Applicant’s Representations:

1. The Company is an internally managed closed-end investment company that has elected to be regulated as a business development company (“BDC”) under the Act. The Company’s investment objective is to maximize its portfolio’s total return, principally by seeking capital gains on its equity and equity-related investments. It invests primarily in the equity securities of what it believes to be rapidly growing venture-capital-backed emerging companies, and may on an opportunistic basis also invest in the debt securities of such companies. Applicant was organized under Maryland General Corporation Law in March 2011. Applicant’s common stock is listed on the Nasdaq Capital Market under the symbol “SSSS.” The Company has 16,577,587 shares of common stock outstanding as of April 15, 2020. As of April 15, 2020, the Company had 6 employees.

2. Applicant currently has a five-member board of directors (the “Board”) of whom four are not “interested persons” of Applicant within the meaning of section 2(a)(19) (“Non-Interested Directors”).

3. Applicant believes that, because the market for superior investment professionals is highly competitive, Applicant’s successful performance depends on its ability to offer fair compensation packages to its professionals that are competitive with those offered by other investment management businesses. Applicant states that the ability to offer equity-based compensation to its employees, officers, and directors, which both aligns employee, officer, and

Board behavior with stockholder interests and provides a retention tool, is vital to Applicant's future growth and success.

4. The Applicant's initial equity incentive plan, which became effective in 2019, is limited only to the types of equity-based compensation that BDCs are permitted to grant under the Act without the receipt of exemptive relief (the "Initial Equity Incentive Plan"). On July 31, 2019, the Board, including a majority of the Non-Interested Directors, approved the Amended Equity Incentive Plan. The Amended Equity Incentive Plan will be submitted for approval to the Company's stockholders, and will become effective upon such approval, subject to and following receipt of the order. The Amended Equity Incentive Plan is intended to expand the Company's ability to issue equity-based compensation to employees, officers, and directors, including Non-Employee Directors, and provides for grants of incentive stock options (as defined in Section 422 of the Internal Revenue Code of 1986), nonqualified stock options, and Restricted Shares.³ Each issuance of Plan Awards under the Amended Equity Incentive Plan will be approved by the required majority, as defined in Section 57(o) of the Act,⁴ of the Company's directors ("Required Majority"). Applicant believes that the issuance of Restricted Shares as a form of equity-based compensation is in the best interest of the Company's stockholders, employees, and business. The Board has delegated its authority to administer the Amended Equity Incentive Plan to the compensation committee of the Board.

5. Applicant states that Non-Employee Directors will be granted \$50,000 of Restricted Shares at each annual meeting of the Company's stockholders, with the first grant to

³ Incentive stock options, nonqualified stock options, and Restricted Shares granted under the Amended Plan are collectively referred to as "Plan Awards."

⁴ Section 57(o) of the Act provides that the term "required majority," when used with respect to the approval of a proposed transaction, plan, or arrangement, means both a majority of a BDC's directors or general partners who have no financial interest in such transaction, plan, or arrangement and a majority of such directors or general partners who are not interested persons of such company.

be issued immediately upon the approval of the Company's stockholders after receipt of the requested order by the Commission. Such Restricted Shares will vest if the Non-Employee Director is in continuous service through the anniversary of such grant (or, if earlier, the annual meeting of the Company's stockholders that is closest to the anniversary of such grant). The awards of Restricted Shares to the Non-Employee Directors will be made on an annual basis for so long as such Non-Employee Director remains on the Board; provided, however, that no Non-Employee Director will be granted Restricted Shares to the extent that such grant would cause he or she to receive more than 2.5% of the total outstanding shares of common stock in any calendar year, or if such grant would cause the Company to exceed the maximum number of shares authorized for issuance under the Amended Equity Incentive Plan. No additional awards of Restricted Shares or Options will be made, and the amounts proposed to be issued to Non-Employee Directors as set forth in the application cannot be changed without Commission approval. All awards of Restricted Shares that have not vested at the time a Non-Employee Director ceases to be a member of the Board will be forfeited. Notwithstanding the limitations set forth in the Amended Plan, the Board has determined that the maximum number of shares of common stock for which any Non-Employee Director may be granted Plan Awards in any calendar year is 25,000 shares.

6. The Board has determined that the total number of Plan Awards to be available under the Amended Plan will be 10 percent of the outstanding shares of common stock as of the effective date of the Amended Plan. Additionally, notwithstanding the limitations set forth in the Amended Plan, the Board has determined that the maximum number of shares of common stock for which any employee, officer or employee-director may be granted Plan Awards in any calendar year is 400,000 shares.

7. Unless the Board expressly provides otherwise, immediately upon the cessation of a Participant's continuous service, that portion, if any, (i) of any Plan Award (other than an Option) held by the Participant or the Participant's permitted transferee that is not then vested will terminate, and, in the case of Restricted Shares, the unvested shares will be returned to the Company and will be available to be issued as Plan Awards and (ii) of any Option held by a Participant or such Participant's permitted transferee that is not yet exercisable will terminate and the balance will remain exercisable for the lesser of (x) a period of three months or (y) the period ending on the latest date on which such Option could have been exercised, and will thereupon terminate subject to certain provisions. Plan Awards will not be transferable except for disposition by will or the laws of descent and distribution or by gift to a permitted transferee.

Applicant's Legal Analysis:

Sections 23(a) and (b), Section 63

1. Under section 63 of the Act, the provisions of section 23(a) of the Act generally prohibiting a registered closed-end investment company from issuing securities for services or for property other than cash or securities are made applicable to BDCs. This provision would prohibit the issuance of Restricted Shares as a part of the Amended Plan.

2. Section 23(b) of the Act generally prohibits a registered closed-end investment company from selling any common stock of which it is the issuer at a price below its current net asset value. Section 63(2) of the Act makes section 23(b) applicable to BDCs unless certain conditions are met. Because Restricted Shares that would be granted under the Amended Plan would not meet the terms of section 63(2), sections 23(b) and 63 would prevent the issuance of Restricted Shares.

3. Section 6(c) provides, in part, that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes thereof, from any provision of the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicant requests an order pursuant to section 6(c) of the Act granting an exemption from the provisions of sections 23(a), 23(b), and 63 of the Act. Applicant states that the Amended Plan would not raise the concerns underlying these sections, which include: (a) preferential treatment of investment company insiders and the use of options and other rights by insiders to obtain control of the investment company; (b) complication of the investment company's structure that made it difficult to determine the value of the company's shares; and (c) dilution of shareholders' equity in the investment company. Applicant asserts that the Restricted Shares element of the Amended Plan does not raise concerns about preferential treatment of Applicant's insiders because this element is a bona fide compensation plan of the type that is common among corporations generally. In addition, section 61(a)(4)(B) of the Act permits a BDC to issue to its directors, officers, employees, and general partners warrants, options, and rights to purchase the BDC's voting securities pursuant to an executive compensation plan, subject to certain conditions. Applicant states that section 61 and its legislative history do not address the issuance by a BDC of restricted stock as incentive compensation. Applicant believes, however, that the issuance of Restricted Shares is substantially similar, for purposes of investor protection under the Act, to the issuance of warrants, options, and rights as contemplated by section 61. Applicant also asserts that the issuance of Restricted Shares would not become a means for insiders to obtain control of

Applicant because the maximum amount of Restricted Shares that may be issued under the Amended Plan at any one time will be ten percent of the outstanding shares of common stock of Applicant.

5. Applicant further states that the Restricted Shares feature will not unduly complicate Applicant's capital structure because equity-based incentive compensation arrangements are widely used among corporations and commonly known to investors. Applicant notes that the Amended Plan will be submitted for approval to the Applicant's stockholders. Applicant represents that the proxy materials submitted to Applicant's stockholders will contain a concise "plain English" description of the Amended Plan and its potential dilutive effect. Applicant also states that it will comply with the proxy disclosure requirements in Item 10 of Schedule 14A under the Securities Exchange Act of 1934. Applicant further notes that the Amended Plan will be disclosed to investors in accordance with the requirements of the Form N-2 registration statement for closed-end investment companies and pursuant to the standards and guidelines adopted by the Financial Accounting Standards Board for operating companies. Applicant also will comply with the disclosure requirements for executive compensation plans applicable to BDCs.⁵ Applicant thus concludes that the Amended Plan will be adequately disclosed to investors and appropriately reflected in the market value of Applicant's shares.

6. Applicant acknowledges that awards granted under the Amended Plan may have a dilutive effect on the stockholders' equity per share in Applicant, but believes that effect would be outweighed by the anticipated benefits of the Amended Equity Incentive Plan to Applicant and its stockholders. Moreover, based on the manner in which the issuance of Restricted Shares

⁵ See Executive Compensation and Related Party Disclosure, Securities Act Release No. 8655 (Jan. 27, 2006) (proposed rule); Executive Compensation and Related Party Disclosure, Securities Act Release No. 8732A (Aug. 29, 2006) (final rule and proposed rule), as amended by Executive Compensation Disclosure, Securities Act Release No. 8756 (Dec. 22, 2006) (adopted as interim final rules with request for comments).

pursuant to the Amended Plan will be administered, the Restricted Shares will be no more dilutive than if Applicant were to issue only Options to Participants who are employees, as is permitted by Section 61(a)(4) of the Act. Applicant asserts that it needs the flexibility to provide the requested equity-based compensation in order to be able to compete effectively with commercial banks, investment banks, and other publicly traded companies that also are not investment companies registered under the Act for talented professionals. These professionals, Applicant suggests, in turn are likely to increase Applicant's performance and stockholder value. Applicant also asserts that equity-based compensation would more closely align the interests of Applicant's employees and Non-Employee Directors with those of its stockholders. In addition, Applicant states that its stockholders will be further protected by the conditions to the requested order that assure continuing oversight of the operation of the Amended Plan by the Board.

Section 57(a)(4), Rule 17d-1

7. Section 57(a) proscribes certain transactions between a BDC and persons related to the BDC in the manner described in section 57(b) ("57(b) persons"), absent a Commission order. Section 57(a)(4) generally prohibits a 57(b) person from effecting a transaction in which the BDC is a joint participant absent such an order. Rule 17d-1, made applicable to BDCs by section 57(i), proscribes participation in a "joint enterprise or other joint arrangement or profit-sharing plan," which includes a stock option or purchase plan. Employees and directors of a BDC are 57(b) persons. Thus, the issuance of Restricted Shares could be deemed to involve a joint transaction involving a BDC and a 57(b) person in contravention of section 57(a)(4). Rule 17d-1(b) provides that, in considering relief pursuant to the rule, the Commission will consider (a) whether the participation of the BDC in a joint enterprise is consistent with the policies and

purposes of the Act and (b) the extent to which such participation is on a basis different from or less advantageous than that of other participants.

8. Applicant requests an order pursuant to sections 57(a)(4) and 57(i) of the Act and rule 17d-1 under the Act to permit Applicant to issue Restricted Shares under the Amended Plan. Applicant acknowledges that its role is necessarily different from the other participants because the other participants are its directors, officers, and employees. It notes, however, that the Amended Plan is in the interest of the Applicant's stockholders, because the Amended Plan will help align the interests of Applicant's employees with those of its stockholders, which will encourage conduct on the part of those employees designed to produce a better return for Applicant's stockholders. Additionally, section 57(j)(1) of the Act expressly permits any director, officer or employee of a BDC to acquire warrants, options and rights to purchase voting securities of such BDC, and the securities issued upon the exercise or conversion thereof, pursuant to an executive compensation plan which meets the requirements of section 61(a)(4)(B) of the Act. Applicant submits that the issuance of Restricted Shares pursuant to the Amended Plan poses no greater risk to stockholders than the issuances permitted by section 57(j)(1) of the Act.

Section 23(c)

9. Section 23(c) of the Act, which is made applicable to BDCs by section 63 of the Act, generally prohibits a BDC from purchasing any securities of which it is the issuer except in the open market pursuant to tenders, or under other circumstances as the Commission may permit to ensure that the purchases are made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicant states that the withholding or purchase of Restricted Shares and common stock in payment of

applicable withholding tax obligations or of common stock in payment for the exercise price of a stock option might be deemed to be purchases by the Company of its own securities within the meaning of section 23(c) and therefore prohibited by the Act.

10. Section 23(c)(3) of the Act permits a BDC to purchase securities of which it is the issuer in circumstances in which the repurchase is made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicant believes that the requested relief meets the standards of section 23(c)(3).

11. Applicant submits that these purchases will be made in a manner that does not unfairly discriminate against Applicant's stockholders because all purchases of Applicant's stock will be at the closing price of the common stock on the Nasdaq Capital Market (or any primary exchange on which its shares of common stock may be traded in the future) on the relevant date. Applicant submits that because all transactions with respect to the Amended Plan will take place at the public market price for the Applicant's common stock, these transactions will not be significantly different than could be achieved by any stockholder selling in a market transaction. Applicant represents that no transactions will be conducted pursuant to the requested order on days where there are no reported market transactions involving Applicant's shares.

12. Applicant represents that the withholding provisions in the Amended Plan do not raise concerns about preferential treatment of Applicant's insiders because the Amended Plan is a bona fide compensation plan of the type that is common among corporations generally. Furthermore, the vesting schedule is determined at the time of the initial grant of the Restricted Shares and the option exercise price is determined at the time of the initial grant of the Options. Applicant represents that all purchases may be made only as permitted by the Amended Plan, which will be approved by the Applicant's stockholders prior to any application of the relief.

Applicant believes that granting the requested relief would be consistent with the policies underlying the provisions of the Act permitting the use of equity compensation as well as prior exemptive relief granted by the Commission under section 23(c) of the Act.

Applicant's Conditions:

Applicant agrees that the order granting the requested relief will be subject to the following conditions:

1. The Amended Plan will be authorized by Applicant's stockholders.
2. Each issuance of Restricted Shares to a Participant will be approved by the Required Majority of Applicant's directors on the basis that such grant is in the best interest of Applicant and its stockholders.
3. The amount of voting securities that would result from the exercise of all of Applicant's outstanding warrants, options and rights, together with any Restricted Shares issued under the Amended Plan, at the time of issuance shall not exceed 25 percent of the outstanding voting securities of Applicant, except that if the amount of voting securities that would result from the exercise of all of Applicant's outstanding warrants, options and rights issued to Applicant's directors, officers and employees, together with any Restricted Shares issued pursuant to the Amended Plan, would exceed 15 percent of the outstanding voting securities of Applicant, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options and rights, together with any Restricted Shares issued pursuant to the Amended Plan, at the time of issuance shall not exceed 20 percent of the outstanding voting securities of Applicant.
4. The amount of Restricted Shares issued and outstanding will not at the time of issuance of any Restricted Shares exceed ten percent of Applicant's outstanding voting

securities.

5. The Board will review the Amended Plan at least annually. In addition, the Board will review periodically the potential impact that the issuance of Restricted Shares under the Amended Plan could have on Applicant's earnings and net asset value per share, such review to take place prior to any decisions to grant Restricted Shares under the Amended Plan, but in no event less frequently than annually. Adequate procedures and records will be maintained to permit such review. The Board will be authorized to take appropriate steps to ensure that the issuance of Restricted Shares under the Amended Plan will be in the best interests of Applicant's stockholders. This authority will include the authority to prevent or limit the granting of additional Restricted Shares under the Amended Plan. All records maintained pursuant to this condition will be subject to examination by the Commission and its staff.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

J. Matthew DeLesDernier
Assistant Secretary