

SECURITIES AND EXCHANGE COMMISSION

Investment Company Act Release No. 34560; 812-15213

Capital Southwest Corporation

April 19, 2022

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, and pursuant to 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 pursuant to section 23(c)(3) of the Act for an exemption from section 23(c) of the Act.

Summary of the Application: Capital Southwest Corporation (“Company” or “Applicant”), requests an order (“Order”) to (a) permit it to issue restricted shares of its common stock (“Restricted Stock”) under the terms of its 2021 Employee Restricted Stock Award Plan (the “2021 Employee Plan”) and its 2021 Non-Employee Director Restricted Stock Award Plan (the “2021 Non-Employee Director Plan”) as part of the compensation package for Employee Participants (as defined below) and Non-Employee Director Participants (as defined below), respectively and (b) to allow the Company to withhold shares of the Company’s common stock or purchase shares of the Company’s common stock from the Employee Participants and Non-Employee Director Participants to satisfy tax withholding obligations relating to the vesting of

Restricted Stock pursuant to the 2021 Employee Plan and the 2021 Non-Employee Director Plan, respectively.

Applicant: Capital Southwest Corporation

Filing Dates: The application was filed on March 29, 2021 and amended on January 21, 2022.

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 e-mailing the Commission's Secretary at Secretarys-Office@sec.gov and serving applicants with a copy of the request by e-mail. Hearing requests should be received by the Commission by 5:30 p.m. on May 15, 2022, and should be accompanied by proof of service on the applicants, 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 e-mailing the Commission's Secretary at Secretarys-Office@sec.gov.

ADDRESSES: The Commission: Secretarys-Office@sec.gov. Applicant: bdiehl@capitalsouthwest.com; msarner@capitalsouthwest.com; sarasabour@eversheds-sutherland.com.

FOR FURTHER INFORMATION CONTACT: Asen Parachkevov, Senior Counsel or Lisa Reid Ragen, Branch Chief, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

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 an 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, a Texas corporation, is an internally managed, non-diversified, closed-end investment company that has elected to be regulated as a business development company (“BDC”) under the Act.¹ The Company’s investment objective is to produce attractive risk-adjusted returns by generating current income from its debt investments and capital appreciation from its equity and equity related investments.

2. Shares of the Company’s common stock are traded on the NASDAQ Global Select Market under the symbol “CSWC.” As of March September 30, 2021, there were 25,680,551 and 23,341,039 shares of the Company’s common stock issued and outstanding, respectively. As of September 30, 2021, the Company had an aggregate of 24 employees.

3. The Company currently has a seven-member board of directors (the “Board”) of whom one is an “interested person” of the Company within the meaning of section 2(a)(19) of the Act and six are not interested persons (the “Non-interested Directors”). The Company has six directors who are neither officers nor employees of the Company.

4. The Company believes that its 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. The Company believes the highly specialized nature of its business, the competitiveness of its market and the small size of its employee base relative to its assets and revenue make such retentions even more critical for the Company, and that the ability

¹ Capital Southwest was incorporated in Texas in 1961. On March 30, 1988 Capital Southwest elected to be regulated as a BDC. Section 2(a)(48) of the Act defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

to offer equity-based compensation to its professionals is vital to the Company’s future growth and success.

5. The Commission previously issued a certain exemptive order (the “Prior Order”), which, among other things, (i) permits the Company to issue restricted shares of its common stock under the terms of the Company’s 2021 Employee Plan as part of the compensation packages for certain of its employees and certain employees of its wholly-owned subsidiaries (“Employee Participants”), and (ii) allows the Company to withhold shares of the Company’s common stock or purchase shares of the Company’s common stock from the Employee Participants to satisfy tax withholding obligations relating to the vesting of Restricted Stock (as defined in the 2021 Employee Plan) pursuant to the 2021 Employee Plan.²

6. The Company states that the relief it is seeking under the requested Order is the same type of relief previously provided by the Commission under the Prior Order, but the requested Order will cover both Employee Participants and non-employee directors of the Board (“Non-Employee Director Participants”, and together with Employee Participants, the “Participants”). The Order would supersede the Prior Order, with the result that the Company will no longer rely on the Prior Order if the Order is granted.

7. The 2021 Employee Plan will authorize the issuance of shares of Restricted Stock by the Company to certain of its employees. The Company states that the Restricted Stock will be subject to restrictions on transferability and other restrictions as required by the compensation committee of the Board, which will be comprised solely of “non-employee directors” within the meaning of rule 16b-3 under the Securities Exchange Act of 1934 (the “Exchange Act”), each of

² “Prior Order” refers to the exemptive order issued by the Commission on July 19, 2021 (see Capital Southwest Corporation, Investment Company Act Release Nos. 34309 (notice) (June 22, 2021) and 34335 (order) (July 19, 2021)).

whom also is not an “interested person” of the Company within the meaning of section 2(a)(19) of the Act (“Compensation Committee). The Company states that except to the extent restricted under the terms of the 2021 Employee Plan, an Employee Participant who is granted Restricted Stock will have all the rights of any other shareholder, including the right to vote the Restricted Stock and the right to receive dividends. The Company states that during the restriction period (i.e., prior to the lapse of the applicable forfeiture restrictions), the Restricted Stock generally may not be sold, transferred, pledged, hypothecated, margined or otherwise encumbered by the Employee Participant. The Company states that except as the Board otherwise determines, upon termination of a Participant’s employment during the applicable restriction period, Restricted Stock for which forfeiture restrictions have not lapsed at the time of such termination shall be forfeited.

8. The 2021 Non-Employee Director Plan will authorize the issuance of shares of Restricted Stock by the Company to Non-Employee Director Participants. The Company states that the Restricted Stock will be subject to restrictions on transferability and other restrictions as required by the Compensation Committee of the Board. The Company states that except to the extent restricted under the terms of the 2021 Non-Employee Director Plan, a Non-Employee Director Participant who is granted Restricted Stock will have all the rights of any other shareholder, including the right to vote the Restricted Stock and the right to receive dividends. The Company states that during the restriction period (i.e., prior to the lapse of the applicable forfeiture restrictions), the Restricted Stock generally may not be sold, transferred, pledged, hypothecated, margined or otherwise encumbered by the Non-Employee Director Participant. The Company states that unless otherwise specified in the award agreement or the Board

determines in any individual case, Restricted Stock awards to Non-Employee Director Participants vest at the end of each one-year term of service on the Board.

9. The Company states that the value of Restricted Stock generally will be taxable to the recipient as ordinary income in the years in which the restrictions on the shares lapse and that such value will be the fair market value of the shares on the dates the restrictions lapse. The Company states that each of the 2021 Employee Plan and the 2021 Non-Employee Director Plan authorizes the Company to withhold common stock (in whole or in part) from any award of restricted shares granted at the time the Restricted Stock is taxed in satisfaction of a Participant's tax obligations.

10. The Company states that maximum amount of Restricted Stock that may be issued and outstanding will not at the time of issuance of any Restricted Stock exceed 10% of the Company's outstanding voting securities.³ In addition, the Company states that no Employee Participant may be granted more than 25% of the shares reserved for issuance under the 2021 Employee Plan and no Non-Employee Director Participant may be granted more than 25% of the shares reserved for issuance under the 2021 Non-Employee Director Plan.

11. The Company states that each issuance of Restricted Stock under the 2021 Employee Plan or the 2021 Non-Employee Director Plan will be approved by the required majority, as defined in section 57(o) of the Act,⁴ of the Company's directors on the basis that the

³ For purposes of calculating compliance with this limit, Capital Southwest counts as Restricted Stock all shares of its common stock that are issued pursuant to the 2021 Employee Plan and the 2021 Non-Employee Director Plan, less any shares that are forfeited back to Capital Southwest and cancelled as a result of forfeiture restrictions not lapsing.

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.

issuance is in the best interests of the Company and its shareholders. The Company states that the date on which the required majority approves an issuance of Restricted Stock will be deemed the date on which the subject Restricted Stock is granted.

12. The Company states that the 2021 Employee Plan was approved by the Board as a whole, including the required majority as defined in section 57(o) of the Act, on March 26, 2021 and was approved by the Company's shareholders on July 28, 2021. In addition, the Company states that the 2021 Non-Employee Director Plan was approved by the Board as a whole, including the required majority as defined in section 57(o) of the Act, on March 26, 2021. The Company states that if the Commission issues the Order, the 2021 Non-Employee Director Plan will become effective upon receipt of the approval of the Company's shareholders.

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 Stock as a part of the 2021 Employee Plan and the 2021 Non-Employee Director Plan.

2. Section 23(b) generally prohibits a registered closed-end management investment company from selling its common stock at a price below its current net asset value (“NAV”). Section 63(2) makes section 23(b) applicable to BDCs unless certain conditions are met. Because Restricted Stock that would be granted under the 2021 Employee Plan and the 2021 Non-Employee Director Plan would not meet the terms of section 63(2), sections 23(b) and 63 prohibit the issuance of the Restricted Stock.

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 of persons, securities or transactions, 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. The Company requests an order pursuant to section 6(c) of the Act granting an exemption from the provisions of sections 23(a) and (b) and section 63 of the Act. The Company states that the concerns underlying those sections 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 makes it difficult to determine the value of the company's shares; and (c) dilution of shareholders' equity in the investment company. The Company states that the 2021 Employee Plan and the 2021 Non-Employee Director Plan do not raise concerns about preferential treatment of the Company's insiders because each of the 2021 Employee Plan and the 2021 Non-Employee Director Plan is a bona fide compensation plan of the type common among corporations generally. In addition, section 61(a)(4)(B) of the Act permits a BDC to issue to its officers, directors and employees, pursuant to an executive compensation plan, warrants, options and rights to purchase the BDC's voting securities, subject to certain requirements. The Company states that while it is not aware of any specific discussion in the legislative history of section 61 of the Act regarding the use of direct grants of stock as incentive compensation, the legislative history recognizes the crucial role that equity-based compensation played in the operation of a private equity fund and its ability to attract and retain employees. The Company believes that the issuance of Restricted Stock is substantially similar, for purposes of investor protection under

the Act, to the issuance of warrants, options, and rights as contemplated by section 61 of the Act.

The Company also asserts that the 2021 Employee Plan and the 2021 Non-Employee Director Plan would not become a means for Participants to obtain control of the Company because the number of shares of the Company issuable under the 2021 Employee Plan and the 2021 Non-Employee Director Plan would be limited as set forth in the application.

5. The Company further states that the 2021 Employee Plan and the 2021 Non-Employee Director Plan will not unduly complicate the Company's structure because equity-based compensation arrangements are widely used among corporations and commonly known to investors. The Company notes that the 2021 Non-Employee Director Plan will be submitted to its shareholders for their approval. The Company represents that a concise, "plain English" description of the 2021 Non-Employee Director Plan, including its potential dilutive effect, will be provided in the proxy materials that will be submitted to the Company's shareholders. The Company also states that it will comply with the proxy disclosure requirements in Item 10 of Schedule 14A under the Exchange Act. The Company further notes that the 2021 Employee Plan and the 2021 Non-Employee Director 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. In addition, the Company will comply with the disclosure requirements for executive compensation plans applicable to BDCs.⁵ The Company thus concludes that the 2021 Employee Plan and the 2021 Non-Employee Director Plan will be

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. 8765 (Dec. 22, 2006) (adopted as interim final rules with request for comments).

adequately disclosed to investors and appropriately reflected in the market value of the Company's shares.

6. The Company acknowledges that, while awards granted under the 2021 Employee Plan and the 2021 Non-Employee Director Plan may have a dilutive effect on the shareholders' equity in the Company, that effect would be outweighed by the anticipated benefits of the 2021 Employee Plan and the 2021 Non-Employee Director Plan to the Company and its shareholders. The Company asserts that it needs the flexibility to provide the requested equity-based employee compensation in order to be able to compete effectively with other financial services firms for talented professionals. These professionals, the Company suggests, in turn are likely to increase the Company's performance and shareholder value. The Company also asserts that equity-based compensation would more closely align the interests of the Company's employees with those of its shareholders. In addition, the Company states that its shareholders will be further protected by the conditions to the requested order that assure continuing oversight of the operation of the 2021 Employee Plan and the 2021 Non-Employee Director Plan by the Company's 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 shares of Restricted Stock 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 (i) whether the participation of the company in a joint enterprise is consistent with the Act's policies and purposes and (ii) the extent to which that participation is on a basis different from or less advantageous than that of other participants.

8. The Company requests an order pursuant to section 57(a)(4) and 57(i) of the Act and rule 17d-1 to permit the Company to issue Restricted Stock under the 2021 Employee Plan and the 2021 Non-Employee Director Plan. The Company states that the 2021 Employee Plan and the 2021 Non-Employee Director Plan, although benefiting the Participants and the Company in different ways, is in the interests of the Company's shareholders because the 2021 Employee Plan and the 2021 Non-Employee Director Plan will help align the interests of the Company's employees and directors with those of its shareholders, which will encourage conduct on the part of those employees, officers and directors designed to produce a better return for the Company's shareholders. 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 Stock pursuant to the 2021 Employee Plan and the 2021 Non-Employee Director 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 to the extent that the transactions between Applicant and the respective Participants described in the application with respect to the 2021 Employee Plan and the 2021 Non-Employee Director Plan constitute “purchases” by Applicant of its own securities, Section 23(c), absent relief, would prohibit such transactions.

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 Global Select Market (or any primary exchange on which its shares of common stock may be traded in the future) on the relevant date (*i.e.*, the public market price on the date of grant of Restricted Stock). Applicant submits that because all transactions with respect to the 2021 Employee Plan and the 2021 Non-Employee Director 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 2021 Employee Plan and the 2021 Non-Employee Director Plan do not raise concerns about preferential treatment of

Applicant's insiders because each of the 2021 Employee Plan and the 2021 Non-Employee Director 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 Stock. Applicant represents that all purchases may be made only as permitted by the 2021 Employee Plan, which was approved by both the Board prior to any application and by shareholders on July 28, 2021, and the 2021 Non-Employee Director 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 2021 Non-Employee Director Plan will be authorized by the Company's shareholders.⁶
2. Each issuance of Restricted Stock to Employee Participants and Non-Employee Director Participants will be approved by the required majority, as defined in section 57(o) of the Act, of the Company's directors on the basis that such grant is in the best interests of the Company and its shareholders.
3. The amount of voting securities that would result from the exercise of all of the Company's outstanding warrants, options, and rights, together with any Restricted Stock issued and outstanding pursuant to the 2021 Employee Plan, the 2021 Non-Employee Director Plan and

⁶ The 2021 Employee Plan was approved by Capital Southwest's shareholders on July 28, 2021.

any other compensation plans of the Company, at the time of issuance shall not exceed 25% of the outstanding voting securities of the Company, except that if the amount of voting securities that would result from the exercise of all of the Company’s outstanding warrants, options, and rights issued to the Company’s directors, officers, and employees, together with any Restricted Stock issued pursuant to the 2021 Employee Plan, the 2021 Non-Employee Director Plan and any other compensation plans of the Company, would exceed 15% of the outstanding voting securities of the Company, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights, together with any Restricted Stock issued pursuant to the 2021 Employee Plan, the 2021 Non-Employee Director Plan and any other compensation plans of the Company, at the time of issuance shall not exceed 20% of the outstanding voting securities of the Company.

4. The amount of Restricted Stock issued and outstanding will not at the time of issuance of any Restricted Stock exceed 10% of the Company’s outstanding voting securities.

5. The Board will review the 2021 Employee Plan and the 2021 Non-Employee Director Plan at least annually. In addition, the Board will review periodically the potential impact that the issuance of Restricted Stock under the 2021 Employee Plan and the 2021 Non-Employee Director Plan could have on the Company’s earnings and NAV per share, such review to take place prior to any decisions to grant Restricted Stock under the 2021 Employee Plan and the 2021 Non-Employee Director 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 Stock under the 2021 Employee Plan and the 2021 Non-Employee Director Plan will be in the best interests of the Company’s shareholders. This authority will include the authority to prevent or limit the granting of

additional Restricted Stock under the 2021 Employee Plan and the 2021 Non-Employee Director 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, under delegated authority.

J. Matthew DeLesDernier
Assistant Secretary