

GIBSON DUNN

Capital Markets Practice Group

Upsizing or Downsizing Your IPO – The Quick Guide

In both upsizing and downsizing, the final per share price may be reflected in a Rule 424 prospectus after effectiveness of the registration statement as follows: (*Instruction (a) to Rule 430A and C&DIs 227.03 and 627.01*)¹:

- For **upsizing**, use Instruction (a) to Rule 430A (assuming that amount set forth in “Calculation of Registration Fee” table on the cover of the registration statement at the time of effectiveness is equal to or greater than the original deal size at the top of the pricerange):
 - Calculate 20% of the maximum aggregate offering price set forth in “Calculation of Registration Fee” table at the time of effectiveness and add that figure to such maximum aggregate offering price. We refer to this as the “Upsize Safe Harbor Amount.”
 - An increase in deal size up to the Upsize Safe Harbor Amount may be reflected in a final prospectus, regardless of materiality. Above the Upsize Safe Harbor Amount, the increase may be reflected in the final prospectus only if it would not materially change the disclosure that was included in the registration statement at the time of effectiveness.
- For **downsizing**, use C&DI 627.01:
 - Calculate 20% of the maximum aggregate offering price set forth in “Calculation of Registration Fee” table at the time of effectiveness and subtract that amount from the implied deal size as calculated at the low end of the price range. We refer to this as the “Downsize Safe Harbor Amount.”
 - A decrease in deal size down to the Downsize Safe Harbor Amount may be reflected in the final prospectus, regardless of materiality. Below the Downsize Safe Harbor Amount, a decrease may be reflected in the final prospectus only if it would not materially change the disclosure that was included in the registration statement at the time of effectiveness.

Additional shares may be registered after effectiveness of the registration statement with an immediately effective Rule 462(b) registration statement in the following circumstances: (*Rules 457, 462(b) and C&DI 640.03*)

- Additional shares may be registered with a Rule 462(b) registration statement if it registers additional securities in amount and price that represent no more than 20% of the maximum aggregate offering price set forth in “Calculation of Registration Fee” table (the “462(b) Limit”).

¹ All rule references are to the rules under the Securities Act of 1933, as amended. The references to C&DIs are to the compliance and disclosure interpretations of the Securities and Exchange Commission (“SEC”).

- If the fee table in the most recently filed registration statement was calculated pursuant to Rule 457(a), the calculation is based on the number of additional shares multiplied by the final price. See *C&DI 640.03*. Note that this calculation allows an overall increase in deal size of **more** than 20% in an upsizing based on a higher per share price, because only the additional shares are multiplied by the new per share price for purposes of this calculation.
- If the fee table was calculated pursuant to Rule 457(o), the calculation is based on total number of shares to be sold (including the new shares added in the upsizing) multiplied by the higher per share price.
- Confirmations cannot be delivered to investors by the underwriters' syndication desks until the Rule 462(b) registration statement registering the additional shares is on file with the SEC.

If:	Then:
The per share price has increased such that the total deal size is within the Upsize Safe Harbor Amount described above.	Reflect the pricing information in the final prospectus.
The per share price has increased such that the total deal size exceeds the Upsize Safe Harbor Amount described above.	Determine whether the information would materially change the disclosure included in the registration statement at the time of effectiveness. If no, reflect the pricing information in the final prospectus.
The per share price and/or number of shares has decreased such that the total deal size is within the Downsize Safe Harbor Amount described above.	Reflect the pricing information in the final prospectus.
The per share price and/or number of shares has decreased such that the total deal size is lower than the Downsize Safe Harbor Amount described above.	Determine whether the information would materially change the disclosure included in the registration statement at the time of effectiveness. If no, reflect the pricing information in the final prospectus. Note that it may be more difficult for the parties to conclude that a change is not material in the case of a downsizing, especially in deals with specific "Use of Proceeds" disclosure.
The per share price and number of shares have increased such that the total deal size is within the Upsize Safe Harbor and the new number of shares is within the 462(b) Limit described above.	File a Rule 462(b) registration statement as soon as possible after pricing and reflect the pricing information in the final prospectus.
The per share price and number of shares have increased such that the total deal size exceeds the Upsize Safe Harbor, but the new number of shares is within the 462(b) Limit described above.	Determine whether the information would materially change the disclosure included in the registration statement at the time of effectiveness. If no, file a Rule 462(b) registration statement as soon as possible after pricing and reflect the pricing information in the final prospectus.

If:	Then:
The per share price has decreased and the number of shares has increased such that the total deal size is within the Downsize Safe Harbor Amount, but the new number of shares is within the 462(b) Limit described above.	File a Rule 462(b) registration statement as soon as possible after pricing and reflect the pricing information in the final prospectus.
The per share price has decreased and the number of shares has increased such that the total deal size is lower than the Downsize Safe Harbor Amount, but the new number of shares is within the 462(b) Limit described above.	Determine whether the information would materially change the disclosure included in the registration statement at the time of effectiveness. If no, file a Rule 462(b) registration statement as soon as possible after pricing and reflect the pricing information in the final prospectus. Note that it may be more difficult for the parties to conclude that a change is not material in the case of a downsizing, especially in deals with specific "Use of Proceeds" disclosure.
The per share price and/or number of shares have moved outside the Rule 462(b) Limit or the parties conclude that a transaction size above the Upsize Safe Harbor Amount or below the Downsize Safe Harbor Amount materially changes the disclosure contained in the registration statement.	A post-effective amendment and/or new registration statement is required to be filed. If this is a possibility, ensure that your SEC examiner is made aware as early as possible and file the post-effective amendment or new registration statement as quickly as possible after the deal terms are available.

A spreadsheet for use in computing offering upsizing and downsizing is available [\[here\]](#). The template is preset with an illustrative deal size of 10,000,000 shares and a per share price range of \$14-16. You can adjust these variables by changing the inputs in cells D8, D11, D15, D16, B 23-31 and, if applicable, C60-68.

Other notes:

In IPOs, most practitioners calculate the fee table pursuant to Rule 457(o) in early filings (before the number of shares and price per share is known), and then calculate the fee table pursuant to Rule 457(a) in later filings (when the number of shares to be offered and per share price range is determined). This approach maximizes flexibility for purposes of the calculations pursuant to Rule 462(b). The fee table should reflect the deal size at least as large as the total number of shares offered (including the shares included in the overallotment option) multiplied by the top of the price range, even though this figure is different than the illustrative deal size used to compute most of the information in the preliminary prospectus (which is generally based on the midpoint of the range). ***The instructions above assume the fee table as of effectiveness is calculated pursuant to Rule 457(a).***

If you know that there may be changes in the per share price and/or number of shares offered that are outside of the safe harbors and limitations described above prior to effectiveness, consider filing a pre-effective amendment. Ensure that your SEC examiner is kept apprised of this possibility, as the SEC examiner will need to quickly review any pre-effective registration statement that is filed prior to granting accelerated effectiveness of the registration statement.

If the proposed changes to deal size are outside of the Upsize Safe Harbor Amount or Downsize Safe Harbor Amount described above, the entire deal team (issuer, underwriters and their respective counsel) should be involved in the discussion of the materiality of the proposed change. In theory, a significant change to the per share price could also raise questions as to whether the initial price range presented to investors during the road show was in fact *bona fide*. In order to potentially help the materiality analysis, consider including a sensitivity analysis in the “Use of Proceeds” disclosure that shows the offering proceeds at higher and lower per share prices.

Relevant Securities Act Rules and SEC Compliance and Disclosure Interpretations

Rule 430A, *Instruction to paragraph (a)*: (<http://www.law.cornell.edu/cfr/text/17/230.430A>) A decrease in the volume of securities offered or change in the bona fide estimate of the maximum offering price range from that indicated in the form of prospectus filed as part of a registration statement that is declared effective may be disclosed in the form of prospectus filed with the Commission pursuant to § 230.424(b) or § 230.497(h) under the Securities Act so long as the decrease in the volume or change in the price range would not materially change the disclosure contained in the registration statement at effectiveness. Notwithstanding the foregoing, any increase or decrease in volume (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b)(1) (§ 230.424(b)(1)) or Rule 497(h) (§ 230.497(h)) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the “Calculation of Registration Fee” table in the effective registration statement.

Rule 457(a): (<http://www.law.cornell.edu/cfr/text/17/230.456>) If a filing fee based on a bona fide estimate of the maximum offering price, computed in accordance with this rule where applicable, has been paid, no additional filing fee shall be required as a result of changes in the proposed offering price. If the number of shares or other units of securities, or the principal amount of debt securities to be offered is increased by an amendment filed prior to the effective date of the registration statement, an additional filing fee, computed on the basis of the offering price of the additional securities, shall be paid. There will be no refund once the statement is filed.

Rule 457(o): (<http://www.law.cornell.edu/cfr/text/17/230.456>) Where an issuer registers an offering of securities, the registration fee may be calculated on the basis of the maximum aggregate offering price of all the securities listed in the “Calculation of Registration Fee” table. The number of shares or units of securities need not be included in the “Calculation of Registration Fee” Table. If the maximum aggregate offering price increases prior to the effective date of the registration statement, a pre-effective amendment must be filed to increase the maximum dollar value being registered and the additional filing fee shall be paid.

Rule 462(b): (<http://www.law.cornell.edu/cfr/text/17/230.462>) A registration statement and any post-effective amendment thereto shall become effective upon filing with the Commission if:

- a) The registration statement is for registering additional securities of the same class(es) as were included in an earlier registration statement for the same offering and declared effective by the Commission;

- b) The new registration statement is filed prior to the time confirmations are sent or given; and
- c) The new registration statement registers additional securities in an amount and at a price that together represent no more than 20% of the maximum aggregate offering price set forth for each class of securities in the “Calculation of Registration Fee” table contained in such earlier registration statement.

SEC C&DI Question 227.03 (<http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>)

Question: A registrant omits pricing information from the prospectus in a registration statement at the time of effectiveness in reliance on Rule 430A. Is it required to reflect pricing information or the inclusion of additional securities in a post-effective amendment?

Answer: The second sentence of the Instruction to Rule 430A provides that a Rule 424(b) prospectus supplement may be used, rather than a post-effective amendment, when the 20% threshold is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus supplement. When there is a change in offering size or deviation from the price range beyond the 20% threshold noted in the second sentence of the Instruction, a post-effective amendment would be required only if such change or deviation materially changes the previous disclosure. Regardless of the size of the increase, in the case of a registration statement that is not an automatic shelf registration statement, a new registration statement must be filed to register any additional securities that are offered. Additional securities cannot be registered by post-effective amendment except on automatic shelf registration statements. [Jan. 26, 2009]

SEC C&DI 627.01: (<http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>) The instruction to paragraph (a) of Rule 430A provides that changes in volume and price representing no more than a 20% change in the maximum offering price set forth in the registration statement fee table may be made pursuant to a Rule 424(b)(1) prospectus supplement. The 20% threshold may be calculated using the high end of the range in the prospectus at the time of effectiveness and may be measured from either the high end (in the case of an increase in the offering price) or low end (in the case of a decrease in the offering price) of that range. [Apr. 24, 2009]

SEC C&DI 640.03 (<http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>) A registration statement for 1,000,000 shares of preferred stock went effective with an estimated offering price of \$15 per share. The fee was calculated and paid in reliance on Rule 457(a). After the effective date, but prior to the commencement of sales, the registrant sought to increase the number of shares to 1,150,000 and increase the offering price to \$17.50 per share. Because more shares are going to be sold than were registered, the registrant must file a new registration statement to register the additional 150,000 shares at \$17.50 per share. A short-form registration statement under Rule 462(b) would be possible since the number of additional shares (150,000) times the new price (\$17.50) is less than 20% of the aggregate dollar amount in the calculation of registration fee table in the original effective registration statement (\$15,000,000); provided, however, that no confirmations may be sent prior to the filing of the Rule 462(b) registration statement. [Jan. 26, 2009]

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