Two Groups of Investors File Separate Lawsuits Against RBS

BASED ON THE BANK'S 2008 RIGHTS ISSUE

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In a June 2008 rights issue, the Royal Bank of Scotland Group plc ("RBS") raised £12 billion from investors in an effort to shore up its capital base as the economy weakened and as its assets, including those it acquired through its disastrous 2007 acquisition of Dutch banking giant ABN Amro, quickly deteriorated in value. Just four months later, in October 2008, RBS needed a Government bailout, and the bank reported a £28 billion net loss for the year. To this day, the bank is still 81%-owned by the UK Government.

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Just a week later, on 3 April 2013, a second lawsuit was filed in the High Court on behalf of the "RBOS Shareholder Action Group," a group that purportedly consists of approximately 12,000 individuals and 100 institutional investors. Based upon its outreach and website, that group is aimed principally at retail investors who must pay an advance ranging from modest amounts to thousands of pounds, depending on the size of their investment, in order to participate in the lawsuit. That group, which asserts that its claim is worth as much as £4 billion, also sued former RBS CEO Sir Fred Goodwin, former Chairman Tom McKillop, former investment-banking head Johnny Cameron and former finance director Guy Whittaker.

Although the particulars of the claims were not publicly available as of this writing, it appears that both of these actions are substantially based on Section 90 of the Financial Services and Markets Act 2000 ("FSMA"), which, among other things, creates a right of compensation for any person who has suffered an investment loss as a result of any untrue or misleading statement in a prospectus or the omission from a prospectus of certain information required to be in it.

Moreover, a new right of action under FSMA Section 90A, which covers a broader range of misstatements and omissions than FSMA Section 90, was recently enacted and then expanded. The new provision may make it easier for aggrieved investors to bring lawsuits against issuers and others that are responsible for their investment losses. Because of the effective date of the new litigation, it is our understanding that FSMA Section 90A could not be used by plaintiffs in the RBS actions.

In addition, a set of reforms of the law of England and Wales with respect to litigation costs and funding, dubbed the "Jackson Reforms," became effective on 1 April 2013. The Jackson Reforms allow a claimant – for the first time – to enter into a United States-style contingency fee agreement, known in England as a "damages-based agreement" (or "DBA") with its counsel. In particular cases, the Jackson Reforms may make it easier for plaintiffs in England and Wales to retain counsel while reducing or eliminating the risk that they will be responsible for legal costs and expenses related to the litigation. How this will play out in specific cases is uncertain.

FSMA Section 90A

Aggrieved investors now have another tool that is *not* available to the RBS claimants: Section 90A of the FSMA.

Section 90A was first added to the FSMA in 2006, and it provided for compensation to purchasers of

securities who reasonably relied on fraudulent or reckless statements made by issuers in certain periodic financial publications, broadly consisting of financial statements and interim management reports. However, Section 90A became effective on 20 January 2007, and so it only applies to financial disclosures for a fiscal year commencing on or after that date – too late to be useful to the RBS claimants. (The first RBS financial disclosures to which it applied were the bank's financial disclosures for the fiscal year ending 31 December 2008, which were issued in early 2009.)

Subsequently, Section 90A was expanded. "New" Section 90A, which became effective on 1 October 2010, provides for compensation to purchasers *and holders* of securities who rely on any fraudulent or reckless statements by issuers that are made available via a "recognised means." New Section 90A therefore covers more investors and a much broader range of disclosures than old Section 90A, as it extends the liability regime to cover all information disclosed by a "recognised information service" ("RIS") or other means of disclosure used to communicate information to the relevant market. It also includes information that has been disclosed by a means other than RIS where the availability of that information has been announced by RIS. For example, where an issuer announces the publication of documents via RIS, the liability regime extends to those documents, regardless of how they are made public.

Claims Brought Against RBS in the United States Have Been Dismissed

As a note of caution, some legal commentators have expressed the view that a fraud standard applies under the "old" Section 90A (and continues to apply to claims brought under the new Section 90A). In contrast, in the United States, claims made under the Securities Act of 1933 against an issuer such as RBS for material false statements or omissions in a prospectus are viable under a strict liability standard, *i.e.* without proving fraud, or even negligence. Plaintiffs in the U.S. bringing such claims only have to prove falsity and materiality.

Nevertheless, Securities Act claims brought against RBS and its top officers were dismissed by a federal judge in New York on 4 September 2012. The U.S. court found, among other things, that claims based on RBS's alleged failure to properly disclose the extent of its sub-prime holdings were not false or material when made (and only appeared to be questionable when looking back at the Company's filings after the 2008 financial crisis caused its sub-prime assets to lose most of their value). The court noted that "There *is* 'no obligation for an issuer to identify specifically every type of asset or liability it possesses, so long as its disclosures are broad enough to cover' all instruments that are in fact relevant to the value of the issuer's securities. Here, the Offering Documents contained extensive disclosure regarding RBS's securitization and lending business."

Likewise, the court found that allegations that RBS made false statements regarding its internal controls were insufficient. The court held that "pointing to the subsequent subprime market collapse and alleging that RBS must therefore have failed to follow its internal control procedures is not sufficient." The court also rejected allegations that RBS failed to disclose "concentrations of risk" related to sub-prime assets and failed to timely and fully mark-to-market its sub-prime holdings. The court noted, for example, that "RBS's CDO holdings were highly rated by independent credit rating agencies in 2006 and 2007."

So, too, the court found that RBS's positive statements regarding its acquisition of ABN Amro were not false; rather, they were "nothing more than corporate optimism" or "inactionable puffery" especially in view of the fact that "RBS made numerous disclosures as to the limited scope of its pre-acquisition diligence review."

This decision has been appealed and is currently being considered by the United States Court of Appeals for the Second Circuit.

It is unclear at this time to what extent the UK cases against RBS raise allegations that are the same or similar to the allegations that troubled the United States trial court.

Conclusion

Going forward, the availability of the newly expanded FSMA Section 90A can significantly aid aggrieved investors in asserting claims against companies and their top officers who make false statements or material omissions causing investment losses. But each case must be carefully examined based on its unique facts.