

# OHHARA LAW OFFICE

3<sup>rd</sup> Floor, Urbannet Kojimachi Building  
1-6-2, Kojimachi, Chiyoda-ku  
Tokyo 102-0083  
JAPAN

September 10, 2014

To: Forest Stewardship Council

## **Report on Legal Issues Affecting the FSC Online Claims Platform**

### **1. Summary**

At the request of Forest Stewardship Council Japan (hereinafter referred to as “FSC Japan”) on behalf of Forest Stewardship Council, we have looked at the potential legal issues and risks under the Laws of Japan affecting the FSC Online Claims Platform (hereinafter referred to as the “OCP”) from the viewpoints of handling of confidential information, data protection, impediment to competition and data security.

As a result of our consideration, our view is that the introduction of the OCP does not materially impact upon the legal issues affecting the OCP, nor does it present any significant legal risks for FSC or its users as compared with current methods used by FSC to verify the Chain of Custody (hereinafter referred to as “CoC”) in relation to FSC certified products.

### **2. Body**

#### **Premises**

The use of the FSC logo on products manufactured from wood indicates that the products are certified under the FSC Certification Scheme. FSC Certification Scheme is a scheme that has been developed to enable independent third party certification of environmentally responsible, socially beneficial and economically viable forest management as a market mechanism allowing producers and consumers to identify and purchase timber and non-timber forest products from well-managed forests.

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The types of certificates under the FSC Certification Scheme include Forest Management certification (hereinafter referred to as “FM Certification”) that is awarded to forest managers or owners whose management practices meet the requirements of the FSC Principles and Criteria and CoC (Chain of Custody) certification that applies to manufacturers, processors and traders of FSC certified forest products and verifies FSC certified material and products along the production chain. As of April 2013, CoC certification has been obtained by 25,723 companies in the world including 1,101 companies in Japan and widely spread in 113 nations around the world.

A key issue with the current CoC certification process is that purchasers of FSC certified products are heavily reliant on their suppliers providing correct information. It is reported that there have been cases where alleged FSC products have been found to not be FSC certified, causing financial and reputational problems for the companies selling these products. There is therefore a need to provide a mechanism by which the information that suppliers have really delivered FSC certified products to purchasers can be confirmed, in order to strengthen the integrity of FSC certification and of the FSC logo, as a globally-recognized brand. The OCP is intended to supplement the CoC certification process and to ensure that the products moving down the supply-chain are in fact FSC certified.

The OCP is the new Online Claims Platform. It is a “cloud-based” software application which digitally connects FSC certified suppliers and customers so that claims for FSC certified products can be swiftly confirmed as accurate by both trading parties.

## **Mechanism and features of the OCP**

How to use the OCP:

### (1) Registration for user account

It is proposed that all current FSC certificate holders (hereinafter referred to as “CH”) will need to register for a user account with the OCP for their certificate. A user account is identified by an email address and has an associated password. A certificate can have one or many user accounts associated with it. The first user account for a certificate must either belong to (one of) the publicly listed FSC contact(s) (found at [info.fsc.org](http://info.fsc.org)) or be authorized by FSC.

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## (2) Connection request and its acceptance

Once CH's have created an OCP user account (CH registered for a user account is hereinafter referred to as "User"), they will be able to search for their existing FSC certified suppliers and much like a social network, send them a request to "connect" via the OCP. The OCP will send a connection request email to the selected registered OCP user for the chosen certificate. Once requests to connect have been accepted by FSC certified suppliers, the OCP can be used to record FSC certification claims made by the connected supplier(s). The requests to connect are required to be confirmed by FSC certified suppliers themselves before accepting the requests and an automatic acceptance system is not available.

## (3) Record of claim

In order to record a claim, the User is required to provide the following information:

- (i) Supplier FSC certificate ID;
- (ii) Transaction identifier (usually invoice number) and transaction date (usually date of invoice);
- (iii) Type of claim, type of product, and quantity purchased.

The information must be carried on the supplier's invoice, according to the FSC CoC standard, and also forms part of the annual audit by a conformity assessment body. In addition, the species or country of harvest of the wood may be required, for example, where the transaction relates to FM Certification.

It is expected that there are three options for entering claims: User Interface (directly entering information on the website); Spread Sheet Processor (uploading a formatted spread sheet); and Application Programming Interface (linking current IT systems with the OCP), but the types of information to be entered are the same in any of the options.

Once the claim has been recorded, the supplier will be notified by the OCP and can check that the details are correct before digitally confirming the claim. This confirmation provides assurance to both parties that the FSC claim is accurate. In the event that an error is identified with the FSC claim, both parties will be notified.

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Key features:

- (1) Access to information on the OCP is limited to Users, conformity assessment bodies granted with access by Users, and ASI (Accreditation Services International GmbH). FSC will have no access to the information in the OCP.
- (2) Users will only be able to view information relating to transactions to which they have been a party, i.e. as the purchaser or the supplier. Users' rights to use the OCP shall include, but are not limited to:
  - creating, editing and deleting relevant data records;
  - reviewing, accepting or rejecting records created by other Users for relevant transactions; and
  - allowing or rejecting read-access rights to third parties (e.g. conformity assessment bodies to review relevant transaction data for the verification of Users' compliance with the FSC requirements).
- (3) ASI will have read-access rights to the full supply-chain on the OCP, but ASI will be able to access only if a complaint requiring a formal investigation has been filed against a User and the User has given permission to ASI.
- (4) The OCP will automatically inform Users of any changes in the Users' suppliers' certificate statuses (e.g. terminated or change in product types).
- (5) The OCP can be used to create a volume summary on purchases and sales of FSC materials, which can be used when preparing for the FSC certification audits.
- (6) The OCP will assist in fulfilling requirements from European Timber Regulation and Lacey Act by providing information about tree species and countries of harvest. The information will be available without seeing the full supply-chain.

## **Consideration of legal issues**

We referred to the following websites and documents in addition to the facts reported by and the documents received from FSC Japan in considering the legal issues described below.

- The websites of FSC International and FSC Japan

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- Terms and Conditions for the FSC Online Claims Platform (hereinafter referred to as the “Terms and Conditions”)
- Frequently Asked Questions about the OCP

## (1) Handling of confidential information

In Japan, wrongful acts concerning certain confidential information (trade secret) are regulated by the Unfair Competition Prevention Act (Act No. 47 of 1993), both in civil and criminal aspects. Therefore, we consider whether providing or obtaining information on the OCP by Users of the OCP may fall under a wrongful use or acquisition or particularly any of the acts listed in Article 2, paragraph (1), items (iv) to (ix) of the Unfair Competition Prevention Act\*.

As described in “Mechanism and features of the OCP” above, the information to be provided on the OCP by Users of the OCP are supplier FSC certificate ID, transaction identifier (usually invoice number), transaction date (usually date of invoice), type of claim, type of product, and quantity purchased (hereinafter

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\* Unfair Competition Prevention Act (Excerpt)

Article 2 (1) The term "unfair competition" as used in this Act means any of the following:

- (iv) the act of acquiring a trade secret by theft, fraud, duress, or other wrongful means (hereinafter referred to as an "act of wrongful acquisition"), or the act of using or disclosing (including the disclosure in confidence to a specific person or persons; the same shall apply hereinafter) a trade secret through an act of wrongful acquisition;
- (v) the act of acquiring a trade secret with the knowledge, or with gross negligence in not knowing, that there has been an intervening act of wrongful acquisition, or the act of using or disclosing a trade secret so acquired;
- (vi) the act of using or disclosing an acquired trade secret after having learned, or having been grossly negligent in not learning, subsequent to its acquisition, that there has been an intervening act of wrongful acquisition;
- (vii) the act of using or disclosing a trade secret that has been disclosed by the business operator that owns said trade secret (hereinafter referred to as the "owner") for the purpose of acquiring a wrongful gain, or causing injury to such owner;
- (viii) the act of acquiring a trade secret with the knowledge, or with gross negligence in not knowing, that such trade secret's disclosure is an act of improper disclosure (meaning, in the case prescribed in the preceding item, the act of disclosing a trade secret for the purpose prescribed in said item, or the act of disclosing a trade secret in breach of a legal duty to maintain secrecy; the same shall apply hereinafter) or that there has been an intervening act of improper disclosure with regard to such trade secret, or the act of using or disclosing a trade secret so acquired;
- (ix) the act of using or disclosing an acquired trade secret after having learned, or having been grossly negligent in not learning, subsequent to its acquisition, that such trade secret's disclosure was an act of improper disclosure or that there has been an intervening act of improper disclosure with regard to such trade secret;

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collectively referred to as “User Provided Information”). User Provided Information must be carried on the supplier’s invoice, according to the FSC CoC standard, and is less likely to fall under a trade secret, and originally, purchasers (Users) obtain the information from suppliers in a lawful manner and provide it on the OCP. For the avoidance of doubt, no price and payment information will be included in User Provided Information.

Moreover, information to be obtained on the OCP by Users will also be limited to User Provided Information of the Users’ suppliers or purchasers. The exception to this is that information about country of harvest and tree species may be obtained by persons other than the immediate parties in the supply-chain, but may be obtained only by purchasers involved in the supply-chain, and other than the information about country of harvest and tree species, no information about the upstream supply-chain will be obtained. When Users search for FSC certified suppliers to request for connection, as a result of the search, they can obtain information about the name, country, certificate ID, category, status and expiry date of the FSC certified suppliers involved in the supply-chain, but the information is the minimum necessary for maintaining the FSC Certification Scheme and it can be said that the information is less likely to fall under a trade secret (The information is also authorized by Users to be published under Article 11.4 of the Terms and Conditions) and it cannot be said that the purchasers (Users) involved in the supply-chain obtain the information by wrongful means. In addition, Users to obtain information on the OCP are subject to obligation of confidentiality (Article 11.1 of the Terms and Conditions).

Furthermore, access to User Provided Information is limited to the Users’ suppliers or purchasers. Conformity assessment bodies and ASI may also have certain access to the information, but only if they obtain permission of the Users and fulfill other requirements. It means that User Provided Information will be, in principle, transmitted between the parties involved in the information and will be provided or used for the purpose of confirming the accuracy of the CoC certification process and it can be said that there is no “wrongful purpose” as long as the provision or use is made within such purpose.

Based on the above, we believe that providing or obtaining information on the OCP by Users of the OCP will not fall under a wrongful use or acquisition of a trade secret of any third party.

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## **(2) Data protection**

In Japan, protection of personal information is regulated by the Act on the Protection of Personal Information (Act No. 57 of 2003; hereinafter referred to as the “Personal Information Protection Act”). Below, we consider whether the processing of information on the OCP may raise an issue of conflict with this Act.

The personal information subject to protection under the Personal Information Protection Act is defined in Article 2 of this Act as “The term ‘personal information’ as used in this Act shall mean information about a living individual which can identify the specific individual by name, date of birth or other description contained in such information (including such information as will allow easy reference to other information and will thereby enable the identification of the specific individual)” and does not include any information about a juridical person or an association or foundation itself but may include information about an officer or employee of a juridical person or information about a business that an individual operates.

We believe that the extent to which information processed by the OCP falls under personal information is very limited but for example, personal email addresses, names and addresses of sole proprietors, etc. should be treated as personal information.

Since Users are required to consent to the Terms and Conditions for the OCP to obtain information from Users, we believe that any issue of conflict with the Personal Information Protection Act will not be raised as long as the information is obtained and used for the purpose and to the extent set forth in the Terms and Conditions and the procedures provided for in the Personal Information Protection Act are observed.

## **(3) Impediment to competition**

As for the issue of an impediment to competition, it is necessary to look at the issue from the viewpoint of regulations under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as the “Antimonopoly Act”) of Japan. In general, the following factors should be considered when judging whether or not a trade association’s activity

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of self-imposed certification and authorization of standards for goods or services constitutes an impediment to competition:

- (1) Whether the activity unjustly harms the interests of users by restricting means of competition;
- (2) Whether the activity unjustly discriminates among firms; and
- (3) Whether the activity is within the necessity rationalized scope to achieve social or other rightful purposes.

In addition, the following items should be considered:

- i) The use of self-imposed certification, authorization, and so forth should be left to the discretion of constituent firms; a trade association's forcing a constituent firm to use self-imposed certification, authorization and so forth is likely to pose a problem in light of the Antimonopoly Act; and
- ii) Under conditions where it is difficult for a firm to conduct business without receiving self-imposed certification, authorization, and so forth from the association, the association is likely to be in violation of the Antimonopoly Act if it imposes restrictions on a specified firm with respect to the use of said certification, authorization, and so forth without rightful reasons.

(Section 7 (2), etc. of “Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act” of the Fair Trade Commission of Japan)

In light of the above criteria for judgment, on the premise that the FSC Certification Scheme meets the requirements of the factors (1) through (3) above, there is a need to consider whether the introduction of the OCP falls under item i) or ii) above. As for item i), we believe that since the participation in the FSC Certification Scheme is left to the discretion of each firm, any particular problem will not occur. The point to be particularly considered for the introduction of the OCP is item ii) – whether or not encouraging CH’s to register on the OCP results in imposing restrictions on CH’s with respect to the use of the FSC Certification Scheme without rightful reasons.

The OCP will be open to all CH’s following a simple registration and without any

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extra fee if they have an Internet connection. The OCP will also be available in multiple languages. In addition, information processed on the OCP will be limited to User Provided Information and species and country of harvest of wood, and information that cannot be obtained unless Users register on the OCP is extremely limited.

We therefore believe that the introduction of the OCP will not increase a risk of the impediment to competition and any particular problem under the Antimonopoly Act will not occur.

#### **(4) Data security**

If data security is not sufficient and information is illegally leaked, a legal issue of civil default or tort will be actualized.

The OCP is to be hosted in Ireland on Amazon's Web Service, which provides a high level of internet security. The underlying software within the OCP will be periodically security-tested by an expert independent third party. Further, Historic Futures, as the developer of the OCP, operates a comprehensive Information Security Management System (ISMS) designed in accordance with the ISO27001 security standard.

Based solely on the information we have received, we believe that these security measures will provide sufficient assurance that the information on the OCP is securely protected.

### **3. Disclaimer**

This report relies on the facts reported by and the documents received from FSC Japan and is not based on an independent research by us, and we have assumed that the facts reported by and the documents received from FSC Japan are true and correct and that there is no other document that conflicts with them.

It should be noted that this report is not directed at, nor should it be relied upon by, members of FSC.

It should also be noted that the contents of this report do not cover all the legal points to

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be noted regarding the OCP, that there may be other views different from the views contained in this report, and that we do not assume any legal liability to FSC Japan or any third party for the contents of this report.

Ohhara Law Office  
Hiroshi Hattori, Attorney at Law  
Fusae Kakishima, Attorney at Law