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Retail Payment System Act 2022

Draft guidance on the initial pricing standard

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Glossary

Term	Definition
1 April 2021 fees the Act	Interchange fees per transaction as at 1 April 2021 Retail Payment System Act 2022
ATM transactions the Commerce Act	ATM cash withdrawal transactions using credit or debit cards Commerce Act 1986
consumer	A person that acquires goods or services from a merchant, as defined in s 7 of the Act
CCPP	Commercial credit payment product
fee caps	The total interchange fee caps applying to the initial designated networks under the IPS
initial designated networks	The Mastercard and Visa credit and debit networks which have been designated under subpart 2 of Schedule 1 of the Act
interchange fee	Has the meaning under cl 1 of Schedule 1 of the Act
IPS	Initial pricing standard under cl 7 of Schedule 1 of the Act
Mastercard	Mastercard International Incorporated
Mastercard Rules	Mastercard Rules dated 11 December 2020 (as updated from time to time)
maximum rates	The maximum interchange fees prescribed by a scheme that can be charged by issuers on that scheme's network, depending on the interchange fee category
merchant	A supplier (within the meaning of the Fair Trading Act 1986) of goods or services to consumers, as defined in s 7 of the Act
Minister	Minister of Commerce and Consumer Affairs
MSF	Merchant service fee
net compensation	Has the meaning under cl 7(4) of Schedule 1 of the Act
network	Retail payment network, as defined in s 7 of the Act
network operator	A person that (a) is wholly or partially responsible to participants for the network rules; and/or (b) operates or manages the network or the core infrastructure of the network, as defined in s 7 of the Act
participant	A network operator or service provider of the network, as defined in s 7 of the Act
payment or transaction	Any transfer of monetary value
retail payment	A payment by a consumer to a merchant for the supply of goods or services, as defined in s 7 of the Act
schemes	Visa and Mastercard
service provider	A person that provides or facilitates the provision of payment services in the network (excluding a merchant), as defined in s 7 of the Act
switch	An operator of switch infrastructure on a network
total interchange fee	The sum of the interchange fee plus any net compensation that can reasonably be attributed to a transaction, as defined in cl 7(4) of Schedule 1 of the Act
Visa	Visa Worldwide Pte. Limited
Visa Rules	Visa Core Rules and Visa Product and Service Rules dated 17 April 2021 (as updated from time to time)

1. Overview of this guidance

Purpose of this guidance

- 1.1 This draft guidance is intended to support participants in meeting their obligations under the initial pricing standard (the **IPS** or the **standard**) contained in subpart 3 of Schedule 1 of the Retail Payment System Act 2022 (**the Act**)¹.
- 1.2 This guidance explains the scope and applicability of the IPS, how we interpret certain key provisions of the IPS, and the information we will require to assess compliance with the IPS.
- 1.3 While this guidance does not open consultation on the standard itself or contain any decisions about amendment or replacement of the standard, we may use information obtained through consultation to inform any future work (including reviewing the standard).
- 1.4 A final version of the guidance will be issued following consultation on this draft guidance. The final guidance may then be revised from time to time to reflect changes in best practice, the law, or our developing experience in monitoring and enforcing compliance with the IPS.
- 1.5 This guidance is our first publication in relation to the Act. While the Act confers a broad range of responsibilities on the Commission, this guidance is focused on the IPS, as the IPS is the only part of the Act which initially imposes enforceable obligations on retail payment system participants.
- 1.6 In the event of any inconsistency between the IPS and any part of this guidance, the IPS takes precedence.

Who will be interested in this guidance

- 1.7 The guidance will be of interest to participants in the Visa and Mastercard credit and debit networks (**initial designated networks**), in particular the network operators, issuers, and acquirers of those networks.
- 1.8 We have begun engaging with the schemes (ie, Visa and Mastercard) and issuers and acquirers participating in the schemes' networks on how they intend to comply with the IPS. We will continue to engage with these participants up to, and following, the IPS coming into force to understand the processes participants are following to ensure compliance with the IPS and any issues they encounter.

¹ The Act can be viewed at: <https://www.legislation.govt.nz/act/public/2022/0021/latest/whole.html#LMS528139>. All statutory references within this draft guidance are to the Act unless otherwise stated.

- 1.9 Ultimately, participants remain responsible for ensuring they comply with the IPS. We expect schemes, issuers, and acquirers to become familiar with this guidance, and we recommend you seek legal advice if you are unsure of your obligations.

Structure of this guidance

- 1.10 The rest of this guidance is provided in the following chapters:
- 1.10.1 **Chapter 2 – Context for this guidance** provides some context on the retail payment system and interchange fees.
 - 1.10.2 **Chapter 3 – An overview of the Act and our role** describes the purpose of, and our key functions under, the Act.
 - 1.10.3 **Chapter 4 – Legal framework for the IPS** sets out the provisions and definitions within the Act of relevance to this guidance.
 - 1.10.4 **Chapter 5 – Participants required to ensure compliance with the IPS** describes the participants with compliance obligations under the IPS and uses scenarios to illustrate those obligations.
 - 1.10.5 **Chapter 6 – Total interchange fee caps** sets out our proposed approach to determining the applicable fee caps under the IPS, the elements required to establish net compensation, the transactions which are not subject to the fee caps under the IPS, and our expectations in respect of inadvertent contraventions.
 - 1.10.6 **Chapter 7 – Information required to assess compliance** describes the information we consider relevant to assess whether the IPS is being complied with.

How you can make a submission

Submissions on this paper

- 1.11 We welcome submissions on this draft guidance to help shape the final guidance, which is expected to be published in late 2022. Please provide your views on this paper by 5pm on Wednesday, 5 October 2022.
- 1.12 While we have raised some specific issues and questions below, we welcome submissions on any aspect of this draft guidance.
- 1.13 A submission template which lists all of the questions posed throughout the guidance is included in Appendix 2.

Process for providing submissions

- 1.14 Please email your submissions to market.regulation@comcom.govt.nz with “Draft IPS Guidance submission – [your submitter name]” in the subject line of your email.
- 1.15 You can make your submission by emailing your submission in both a format suitable for word processing (such as a Microsoft Word document), and a ‘locked’ format (such as a PDF) for publication on our website.

Identifying and managing confidential information

- 1.16 The Commission has processes in place for the protection of confidential information. When including commercially sensitive or confidential information in your submission:
- 1.16.1 Please provide a clearly labelled confidential version and public version of your submission. We intend to publish all public versions on our website.
 - 1.16.2 The responsibility for ensuring that confidential information is not included in a public version of a submission rests entirely with the party making the submission.
- 1.17 Please note that all submissions we receive, including any parts that we do not publish, can be requested under the Official Information Act 1982. This means we would be required to release material that we do not publish unless good reason existed under the Official Information Act 1982 to withhold it. We would normally consult with the party that provided the information before any disclosure is made.

2. Context for this guidance

- 2.1. The Act was passed on 13 May 2022 and introduces a new regulatory regime for the retail payment system, including the IPS which regulates the level of interchange fees on the schemes' networks. Interchange fees are generally the largest component of merchant service fees (**MSFs**), which are charged by acquirers to merchants for processing certain payments.
- 2.2. The Act was introduced as a result of the Ministry of Business, Innovation and Employment's review of MSFs and the broader retail payment system.² That review identified a lack of efficient competition in aspects of the system, leading to poor outcomes for merchants and consumers. Of particular note to this guidance, the review found that MSFs were high relative to international comparisons.³
- 2.3. We discuss the retail payment system and interchange fees below, both of which are integral to this guidance.

Retail Payment System

- 2.4. The retail payment system facilitates the transfer of monetary value from consumers (including businesses) to merchants in exchange for goods and services.
- 2.5. The retail payment system is comprised of various "retail payment networks" – which include the participants, arrangements, contracts, and rules that enable a class of retail payments to be processed.⁴
- 2.6. Retail payment networks are operated by different providers (for example, Visa and Mastercard) and each network has its own standards and rules that govern how it operates.
- 2.7. A retail payment network includes all payment methods and products within that network. For example, the Visa and Mastercard credit networks are mainly used with physical credit cards but other payment methods, such as tokenised credentials in a mobile app, are included within the network.
- 2.8. The focus of this guidance is the Visa and Mastercard credit and debit networks, as they are subject to the IPS.

² See, in particular, Ministry of Business, Innovation and Employment "Issues Paper: Regulating to reduce Merchant Service Fees" (December 2020). Accessed at: <https://www.mbie.govt.nz/dmsdocument/12383-issues-paper-regulating-to-reduce-merchant-service-fees-pdf>.

³ [Ministry of Business, Innovation and Employment, Retail Payment System \(16 May 2022\)](#).

⁴ Section 7, definition of "retail payment network".

- 2.9. The key parties within each of those networks, for the purpose of this guidance, are:
- 2.9.1. The **consumer** who uses a card (or other product) on the network to purchase goods and services.
 - 2.9.2. The **merchant** which sells goods and services in return for payment.
 - 2.9.3. The **issuer** (usually a bank) which issues cards and provides credit and debit facilities to consumers.
 - 2.9.4. The **acquirer** which enables the merchant to access the retail payment system by processing retail payments.
 - 2.9.5. The **scheme** which operates the network, and develops technology and products and on-sells these to issuers and acquirers (who may only operate on the network if approved by the scheme) to facilitate retail payments in accordance with the schemes' published rules. For the purposes of the IPS (and this guidance), the relevant schemes are Visa and Mastercard.
- 2.10. We discuss issuers, acquirers and the schemes further in Chapters 4 and 5.
- 2.11. The following is an example of the Visa credit network in action: when a consumer purchases a product from a supermarket (a merchant), they may use a credit card provided by their agent (the issuer) on the Visa network (the scheme network). Payment is then transferred to the merchant's agent (the acquirer) who makes it available to the merchant after the deduction of fees.
- 2.12. A number of fees are involved in the payment process described above, but the most relevant to this guidance is the interchange fee.

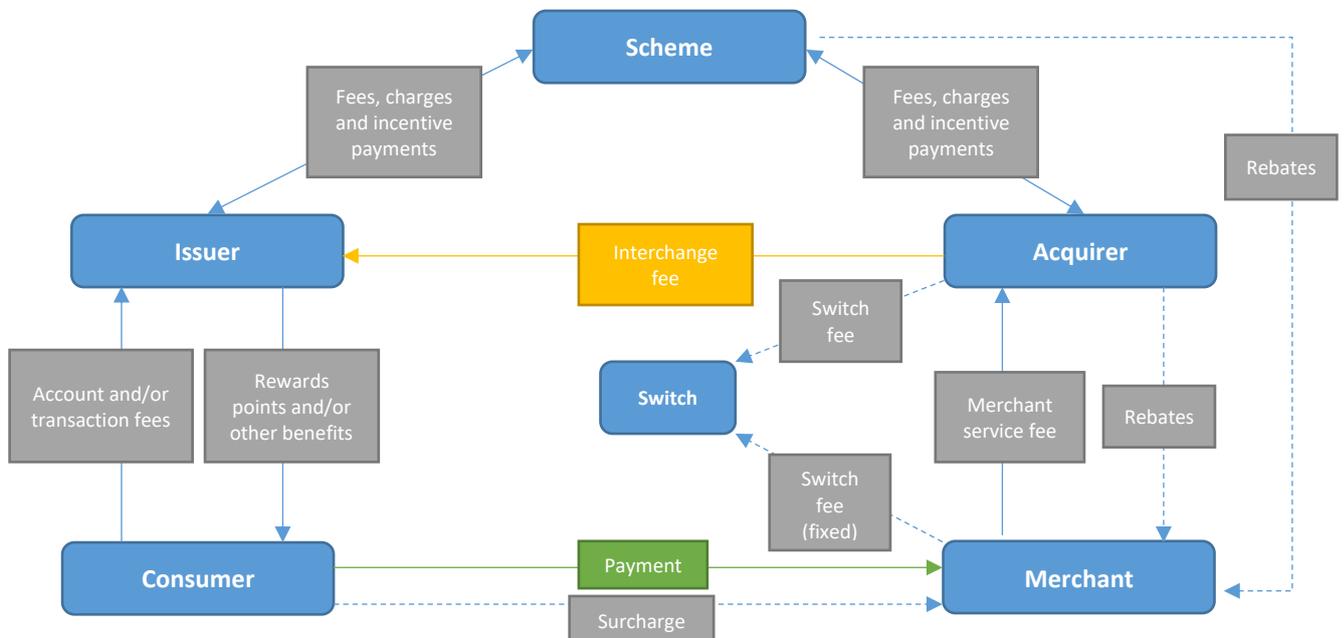
Interchange fees

- 2.13. The IPS sets caps on interchange fees for Mastercard and Visa credit and debit transactions.
- 2.14. An interchange fee is a fee paid by the acquirer to the issuer for a transaction.⁵ The interchange fee is generally a percentage of the value of the relevant transaction.

⁵ See chapter 5 for information on how interchange fees are set and charged in practice.

- 2.15. We understand that the interchange fee is intended to cover the costs associated with accepting, processing and authorising certain transactions (for example, fraud costs). Visa and Mastercard also contend that the interchange fee acts as a mechanism to balance the interests of, a maximise the value delivered to, participants within the network.⁶
- 2.16. Interchange fees are only payable on certain transactions – such as credit card transactions, and contactless, card-not-present (eg, online), and international scheme debit transactions. Those transactions are processed using a ‘switch-to-acquirer’ model. Put simply, this means the transaction is routed to the acquirer first, then the issuer.
- 2.17. In comparison, ‘switch-to-issuer’ transactions are routed directly to the issuer. This includes EFTPOS transactions or where a debit card is inserted or swiped (ie, contacted-in-person), which take place over the EFTPOS network and do not attract interchange fees. Accordingly, the focus of this guidance is on ‘switch-to-acquirer’ transactions.
- 2.18. The fees and inducements in a switch-to-acquirer transaction are illustrated in Figure 1 below, with the interchange fee highlighted in yellow. Note, however, that not all flows shown below are applicable in all situations. The bold lines represent ‘core’ flows, while the dotted lines represent ‘secondary’ flows.

Figure 1: Fees and inducements in switch-to-acquirer transactions



⁶ See Visa “Response to Economic Development, Science and Innovation Committee on the Retail Payment System Bill” at [16] and Westpac “Understanding Interchange” at: <https://www.mastercard.co.nz/en-nz/business/overview/support/interchange.html#:~:text=Interchange%20is%20a%20small%20fee,when%20they%20accept%20electronic%20payments>.

- 2.20. Acquirers pass on the cost of interchange fees to merchants through MSFs.⁷ Certain larger merchants are classified as strategic merchants by the schemes. Transactions processed for strategic merchants attract lower interchange fees, and therefore a lower MSF, than transactions processed for small businesses.
- 2.21. Our understanding of how interchange fees are set and processed is set out in Chapter 5 below.

⁷ The MSF charged by an acquirer generally also includes pass-through of other fees, such as scheme fees, switch fees, merchant servicing costs and float costs, and the margin retained by the acquirer.

3. Overview of the Retail Payment System Act

3.1. This chapter describes the purpose of, and our key functions under, the Act.

Purpose and principles of the Act

3.2. The purpose of the Act is to promote competition and efficiency in the retail payment system for the long-term benefit of merchants and consumers (including businesses) in New Zealand.⁸ Our powers and functions must be exercised for that purpose.⁹

3.3. In addition, in exercising our functions and powers we must take into account, to the extent relevant, the principles that:¹⁰

3.3.1. merchants and consumers should pay no more than reasonable fees for the supply of payment services; and

3.3.2. the retail payment system provides a reasonable degree of transparency.

Our functions under the Act

3.4. The core functions of the Commission under the Act are:¹¹

3.4.1. Regulation-making;

3.4.2. Compliance and enforcement; and

3.4.3. Market monitoring and information dissemination.

Regulation-making

3.5. The Act includes a designation regime, under which any retail payment network (other than cash) may be designated by Order in Council by the Governor-General on the recommendation of the Minister, after receiving a recommendation from the Commission.¹²

⁸ Section 3.

⁹ Section 4(1).

¹⁰ Section 4(2) provides that the Commission must take into account those principles, to the extent it considers them relevant, when deciding whether to exercise, or in exercising, any function or power under the Act.

¹¹ The Commission has other associated functions such as co-operation with other law enforcement and regulatory agencies that carry out a role in relation to the retail payment system (see, in particular, s 6(d)).

¹² Sections 10(1), 11, and 12(1). Note the Minister may either accept or reject the Commission's recommendation, request the Commission reconsider any matter, or make any other decision the Minister considers is in the public interest.

- 3.6. After a network is designated the Commission may:
- 3.6.1. Issue network standards in respect of the designated network, which may relate to information disclosure, pricing or access;¹³ and
 - 3.6.2. Give directions about the network rules of the designated network, which may require:¹⁴
 - 3.6.2.1. The network operator to set, amend, notify amendments to, or obtain the Commission's approval for substantive amendments to, the network rules; or
 - 3.6.2.2. Any participant to comply with the network rules.
- 3.7. The Commission may also issue merchant surcharging standards applying to merchants utilising any payment network (not just those that are designated) to ensure that surcharges for payment services reflect the cost to the merchant of the payment services used for accepting retail payments.¹⁵ Merchant surcharging standards may relate to the disclosure of information, representation of surcharges, limits on surcharges or record keeping.¹⁶
- 3.8. In addition to these processes, the Act provides for the regulation of interchange fees from 13 November 2022 by:
- 3.8.1. designating the Visa and Mastercard credit and debit networks;¹⁷ and
 - 3.8.2. setting a network standard contained in Schedule 1 of the Act (that is, the IPS),¹⁸ which regulates interchange fees which may be charged on transactions within the Visa and Mastercard credit and debit networks.

Compliance and enforcement

- 3.9. The Commission is responsible for the enforcement of obligations arising under or in connection with the Act.

¹³ Section 17.

¹⁴ Section 24.

¹⁵ Sections 29 and 30.

¹⁶ Section 32.

¹⁷ Subpart 2 of Schedule 1.

¹⁸ Subpart 3, Schedule 1 of the Act.

- 3.10. Potential remedies the Commission may seek in cases of breach of a network standard vary depending on the nature of the breach. However, they include pecuniary penalties, injunctions restraining conduct or requiring action to be taken, and compensation orders.
- 3.11. We discuss our enforcement powers in more detail in Chapter 4 below.
- 3.12. For further information on our approach to enforcement, refer to the following documents on our website:
- 3.12.1. [Transparency Statement](#)¹⁹ – information on how we gather information to prevent, investigate and respond to regulatory non-compliance;
 - 3.12.2. [Enforcement Criteria](#)²⁰ – setting out the criteria we apply when making decisions on whether to open an investigation, and what enforcement action we will take at the end of an investigation; and
 - 3.12.3. [Enforcement Response Guidelines](#)²¹ – outlining the way in which we exercise our enforcement discretion, including the factors we will take into account when deciding what enforcement response to use.

Market monitoring and information dissemination

- 3.13. The Commission has a market monitoring function, under which the Commission:²²
- 3.13.1. May monitor competition and efficiency in the retail payment system;
 - 3.13.2. May conduct inquiries, reviews and studies into any matter relating to the retail payment system in New Zealand; and
 - 3.13.3. Must make available reports, summaries and information relating to its monitoring activities described above.
- 3.14. The Commission must also make available information with respect to its functions and powers under the Act, and the purposes and provisions of the Act.²³

¹⁹ Accessed at: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/transparency-statement#:~:text=to%20detect%2C%20investigate%20and%20prosecute,respond%20to%20regulatory%20non%E2%80%91compliance>.

²⁰ Accessed at: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-criteria>.

²¹ Accessed at: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>.

²² Section 6(a),(b) and (c).

²³ Section 38(e), which imports s 25 of the Commerce Act with all necessary modifications.

4. Legal framework for the IPS

Initial pricing standard

- 4.1. The IPS sets caps on interchange fees which may be charged for Mastercard and Visa credit and debit transactions. Interchange fees are generally the largest component of MSF, and therefore by capping interchange fees the IPS is intended to reduce costs to merchants.²⁴
- 4.2. Subpart 3 of Schedule 1 sets out the IPS, under which clauses 7(2) and (3) provide:

Limits on interchange fees

- (2) This standard requires that total interchange fees for credit retail payment networks ... must not exceed the lower of—
- (a) 0.80% per transaction:
 - (b) the interchange fees per transaction as at 1 April 2021.
- (3) This standard requires that total interchange fees for debit retail payment networks ... must not exceed the lower of:
- (a) the interchange fees per transaction as at 1 April 2021:
 - (b) whichever of the following applies:
 - (i) in the case of any contacted-in-person payment method, 0.00% per transaction:
 - (ii) in the case of any contactless-in-person payment method, 0.20% per transaction:
 - (iii) in the case of any online or other payment method, 0.60% per transaction:
 - (c) if a contactless-in-person debit card interchange fee is charged by the cents (for example, a flat fee rather than a percentage of the transaction value), 5 cents per transaction.

Definition of total interchange fees

- 4.3. The IPS requires that the “total interchange fees” for a transaction within the initial designated networks must not exceed the applicable cap under the IPS.
- 4.4. The “total interchange fee” means the sum of the following two components:²⁵
- 4.4.1. The interchange fee; and

²⁴ See Hon Dr David Clark “Retail Payment System Bill – First Reading” (26 October 2021) and Retail Payment System Bill 2022 (80–2) (select committee report) at 2.

²⁵ Clause 7(4) of Schedule 1.

- 4.4.2. Any net compensation that can be reasonably attributed to a transaction (for example, by dividing net compensation for a period by the number or value of relevant transactions during the same period).

Interchange fees

- 4.5. Interchange fee is defined by reference to the relevant network rules.²⁶ The interchange fee definitions from the Visa and Mastercard Rules are set out in Appendix 1.
- 4.6. For the purpose of interpreting and applying the legislation, we consider that the relevant interchange fee is the amount set by the issuer to be paid to it by the acquirer for the relevant transaction.

Net compensation

- 4.7. Net compensation is defined under cl 7(4) of Schedule 1 as:

...the net value of any payments, rebates, incentives, or other means of monetary and non-monetary compensation that are made after the date on which this Act receives the Royal assent and that have a purpose of compensating an issuer for the effect of this standard.

- 4.8. We discuss the elements required to establish net compensation in Chapter 6.

Participants of the initial designated networks

- 4.9. The IPS applies to the initial designated networks:
- 4.9.1. Mastercard credit;
 - 4.9.2. Mastercard debit;
 - 4.9.3. Visa credit; and
 - 4.9.4. Visa debit.
- 4.10. Although the Act provides for the regulation of networks, it is the participants within those networks which must comply or ensure compliance with any regulation (eg, the IPS):
- 4.10.1. Network standards may either impose requirements on participants or require participants to ensure compliance with those standards.²⁷

²⁶ Clause 1 of Schedule 1.

²⁷ Section 17(2).

- 4.10.2. Directions require participants to take a specified action in accordance with the direction.²⁸
- 4.11. The Act defines the participants of a network to mean the network operators and service providers of that network:²⁹
- 4.11.1. *Network operator* – means any person that is or does one or more of the following:
- 4.11.1.1. is wholly or partly responsible to the participants (or any of them) for the network rules.
- 4.11.1.2. operates or manages the network or the core infrastructure of the network.
- 4.11.2. *Service provider* – means any person that provides or facilitates the provision of payment services in the network (for example, a payment or an infrastructure service provider), but does not include a merchant.³⁰ Other examples of service providers include issuers, acquirers, switch operators, terminal providers, and payment gateways within the Visa and Mastercard networks.
- 4.12. These definitions mean that “participants” are all of the parties who have a role in the operation of a retail payment network, except merchants and consumers.

Network operators

- 4.13. There may be more than one operator of a network, but a designation of a network must specify at least one operator.³¹
- 4.14. The initial designations provide:³²
- 4.14.1. Mastercard International Incorporated is a network operator of the Mastercard credit and debit networks.
- 4.14.2. Visa Worldwide Pte. Limited is a network operator of the Visa credit and debit networks.

²⁸ Section 24.

²⁹ Section 7, definition of “participant”.

³⁰ Section 7, definition of “service provider”.

³¹ Section 14(1)(b).

³² Clauses 3 to 6 of Schedule 1.

Service providers

- 4.15. Issuers and acquirers are two categories of service providers who have a role in relation to the IPS.

Issuers

- 4.16. The Act defines an issuer by reference to the relevant network rules.³³ The definitions from the Visa and Mastercard Rules are set out in Appendix 1.
- 4.17. It follows from those definitions, that an issuer is a participant that issues cards and provides credit and/or debit facilities to customers.
- 4.18. For example, a bank or other organisation that issues Mastercard debit and credit cards is an issuer within the Mastercard debit and credit networks.

Acquirers

- 4.19. The Act defines an acquirer by reference to the relevant network rules.³⁴ The definitions from the Visa and Mastercard Rules are set out in Appendix 1.
- 4.20. It follows from those definitions, that an acquirer is a participant that enables the merchant access to the payment system by processing retail payments.
- 4.21. For example, a bank or other organisation that acquires transactions for a merchant from both Visa and Mastercard credit and debit cards is an acquirer in both the Visa and Mastercard credit and debit networks.
- 4.22. A single legal person, usually a bank, may operate as both an issuer and an acquirer, to the extent that they issue cards and provide facilities to consumers and also offer acquiring services to merchants. In some cases, that single legal person may act as both the issuer and acquirer for the same transaction.

Contraventions of the IPS**Commission's enforcement powers**

- 4.23. In respect of any contravention of the IPS, the Commission has the power to:
- 4.23.1. bring proceedings in the High Court for pecuniary penalties;³⁵
- 4.23.2. apply to the High Court for compensation orders;³⁶

³³ Clause 1 of Schedule 1.

³⁴ Clause 1 of Schedule 1.

³⁵ Section 39.

³⁶ An application for a compensation order under s 45 may also be made by an aggrieved person.

- 4.23.3. bring proceedings in the High Court for injunctions, which can:³⁷
- 4.23.3.1. restrain a person from engaging in conduct that constitutes or would constitute a contravention of the Act; or
 - 4.23.3.2. require a person to do an act or thing if (a) that person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do that act or thing; and (b) the refusal or failure was, is, or would be, a contravention of the Act; and
- 4.23.4. accept undertakings, and bring proceedings in the High Court to enforce undertakings.³⁸
- 4.24. The Commission may also issue warnings and compliance advice letters and enter into settlements.

Liability for contraventions of the IPS

- 4.25. The pecuniary penalty provisions in s 39 apply where a person has:³⁹
- 4.25.1. Contravened the IPS; or
 - 4.25.2. Been involved in the contravention of the IPS.
- 4.26. Section 42 provides that a person has been “involved in a contravention” where the person has:
- (a) has attempted to contravene any of those provisions; or
 - (b) has aided, abetted, counselled, or procured any other person to contravene any of those provisions; or
 - (c) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene any of those provisions; or
 - (d) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of any of those provisions; or
 - (e) has conspired with any other person to contravene any of those provisions.

³⁷ Section 47.

³⁸ Section 46.

³⁹ Section 39(1).

- 4.27. Accordingly, depending on the facts and circumstances of the particular contravention, more than one person may be liable for a contravention of the IPS (either on a principal or secondary basis).
- 4.28. The amount of a pecuniary penalty for a breach of the IPS may be up to:
 - 4.28.1. In the case of an individual, \$500,000 for each act or omission; and
 - 4.28.2. In any other case, \$5 million for each act or omission.

5. Participants required to ensure compliance with the IPS

- 5.1. This chapter describes the participants of the initial designated networks which we consider are required to comply with the obligations under the IPS.

Summary

- 5.2. The IPS caps the total interchange fee that may be charged for a particular credit or debit card transaction that is covered by the IPS. As explained below, the designated network operators (Mastercard and Visa), and issuers and acquirers of the initial designated networks, are the parties most closely involved in the setting, processing and charging of interchange fees.
- 5.3. We consider that these participants each have a principal responsibility for ensuring compliance with the IPS.
- 5.4. We expect schemes to provide us with a full list of issuers and acquirers which operate within their designated networks.

Context

- 5.5. Below we describe how an interchange fee is set and charged to assist in understanding which participants are responsible for ensuring compliance with the IPS.

How is an interchange fee set?

- 5.6. The schemes have a key role in setting interchange fees because they each prescribe a schedule of interchange fees which set out the:
- 5.6.1. List of interchange fee categories, which depend on a combination of the following:
- 5.6.1.1. The type of merchant the transaction is being processed for. Transactions processed for most merchants are subject to standard interchange fees, however, certain merchants are categorised by the schemes as ‘strategic merchants’ with different strategic merchant interchange fee category rates applied. Government, insurance, charity, and utilities payments may also be subject to different interchange fee categories;
 - 5.6.1.2. The type of payment product used – for example, a standard card or a premium card; and
 - 5.6.1.3. The payment method used – for example, card-present or card-not-present, contactless or inserted.

- 5.6.2. Maximum interchange fees that can be charged by issuers on that scheme's network for each interchange fee category (**maximum rates**).
- 5.7. Each issuer is bound by the interchange fee categories set by the relevant scheme, but is able to set (or bilaterally agree with an acquirer) its interchange fees subject to the maximum rates set by the scheme.
- 5.8. In practice, we understand that issuers customarily adopt the maximum rates set by the schemes.

Question 5A: Are you aware of any issuer setting or bilaterally agreeing an interchange fee which is below the maximum rates since 31 March 2021? If so, please provide details of the arrangement.

How is an interchange fee charged/processed?

- 5.9. We understand that interchange fees are generally assigned and charged as follows.
- 5.9.1. Following the authorisation of the transaction, usually at the end of the day in the case of a terminal-based payment and more frequently in the case of a card-not-present payment, the merchant's switch operator (**switch**) sends certain information about the transaction (such as the payment amount, method and card type) to the acquirer.
- 5.9.2. The acquirer, taking into account the information from the switch and the merchant's interchange fee category, assigns an indicator to the transaction and sends that indicator to the scheme.
- 5.9.3. The scheme allocates the value for the particular interchange fee category, based on the indicator, which determines the applicable interchange fee.
- 5.9.4. The scheme then determines the net position for issuers and acquirers for transactions during the period, accounting for the interchange fees payable by the acquirer and the payment amounts owed by the issuer. Settlement of the net positions then occurs through the normal inter-bank settlement system. The result of which is that the acquirer receives the value of the transaction minus the interchange fee amount. We refer to this as the **net settlement** process below.

Question 5B: Have we accurately described how interchange fees are set, assigned and charged in practice? If not, please provide an explanation.

Mastercard and Visa

- 5.10. Mastercard and Visa have been designated as the network operators of their respective networks, and are therefore both subject to compliance with the IPS.
- 5.11. Visa and Mastercard have a key role to play in (a) setting the maximum rates; and (b) the net settlement process through which interchange fees are charged and settled.

Other participants of the initial designated networks

- 5.12. We consider that any participant involved in the setting or charging of total interchange fees, and who is in a position to affect compliance with the IPS, has a responsibility for ensuring compliance with the obligations under the IPS.
- 5.13. Accordingly, in addition to the schemes, we consider that issuers and acquirers have key compliance obligations under the IPS:
 - 5.13.1. Issuers – as the person that sets, charges, and receives the direct benefit of interchange fees.
 - 5.13.2. Acquirers – as a person with a role in the processing of transactions and therefore the charging of interchange fees.
- 5.14. However, depending on the facts and circumstances of any contravention of the IPS, other persons may have a causative role in the setting and charging of interchange fees, or compliance with the IPS. For example, where an intermediary has provided what we determine to be net compensation to an issuer, they may be considered to have contravened the IPS or been "involved in the contravention".

Scenarios

- 5.15. In order to illustrate the obligations imposed under the IPS on the schemes, issuers and acquirers of the initial designated networks, two simplified scenarios and accompanying analysis are provided below.
- 5.16. The scenarios discussed below are for illustrative and consultation purposes only. We will assess any potential contravention on its own terms against the requirements of the Act, and it is open to us to take a view that differs from those expressed below.

Scenario one – interchange fee

5.17. Set out below is a scenario where the IPS has been breached:

Scenario one

The scheme sets its maximum rate for contactless debit at 0.30%, but the applicable cap under the IPS is 0.20%. The issuer adopts the maximum rate of 0.30% and charges the acquirer at this rate.

5.18. In the above scenario, we consider that each of the scheme, issuer, and acquirer had the ability to ensure compliance with the IPS and failed to do so. Accordingly, it may be the case that each person has either contravened, or been involved in the contravention of, the IPS.

5.18.1. The issuer has set and charged a total interchange fee for contactless debit transactions which exceeds the statutory cap.

5.18.2. The scheme set its maximum rate for contactless debit at 0.30% which allowed the issuer to set a non-compliant fee, and was involved in entering that interchange fee into its interchange system and assigning that fee in the net settlement process.

5.18.3. The acquirer is involved in entering the non-compliant interchange fee into the interchange system which enabled that fee to be assigned and charged. It is also relevant that the acquirer is the person that paid the non-compliant interchange fee.

Scenario two – net compensation

5.19. Set out below is a scenario where the IPS has been breached due to the provision of net compensation to the issuer:

Scenario two

The issuer adopts a compliant rate of 0.20% for contactless debit, but due to the payment of monetary compensation by the scheme to the issuer (ie, the provision of net compensation), the total interchange fee for contactless debit was assessed by the Commission to be 0.22%.

5.20. In the above scenario, we consider that the scheme and the issuer have either contravened, or been involved in the contravention of, the IPS. However, that is unlikely to be the case for the acquirer.

5.20.1. The issuer has received a total interchange fee for contactless debit transactions which exceeds the applicable cap under the IPS.

5.20.2. The scheme has provided net compensation to the issuer and we understand that, unlike the acquirer, it has visibility of the issuer's net compensation position. That is to say, the scheme is aware (or ought to be

aware) that the provision of net compensation by it to the issuer would cause the cap under the IPS to be breached for contactless debit transactions.

- 5.20.3. The acquirer has entered an interchange fee into the interchange system, assigned an indicator, and paid an interchange fee, which is compliant from its vantage point as it does not have visibility over the issuer's net compensation position.

Question 5C: We are seeking your views on the following:

- i. Do you agree with our analysis of scenario one? Why/why not?
- ii. Do you agree with our analysis of scenario two? Why/why not?
- iii. Are there any additional high-level scenarios you see benefit in us considering at this stage? If so, please provide a description of those scenarios.

6. Total interchange fee caps under the IPS

- 6.1. This chapter describes the “total interchange fee” caps (**fee caps**) that apply under the IPS, and is structured as follows:
- 6.1.1. **Total interchange fee caps** – describing our proposed approach to determining the applicable fee caps.
 - 6.1.2. **Net compensation** – clarifying the elements required to establish net compensation.
 - 6.1.3. **Transactions not subject to the interchange fee caps** – being commercial credit payment products, payment instruments issued outside New Zealand, prepaid payment products and ATM transactions.
 - 6.1.4. **Inadvertent contraventions** – setting out our expectations in respect of how inadvertent contraventions are dealt with by participants.

Our approach to determining the applicable fee caps

- 6.2. The fee caps imposed by the IPS are set out in Table 1 below.⁴⁰

Table 1: IPS fee caps

Visa and Mastercard initial designated networks		Total interchange fees must not exceed the lower of	
Credit		0.80%	The interchange fees per transaction as at 1 April 2021
Debit	Contacted-in-person	0.00%	
	Contactless-in-person	0.20%	
	Online or any other payment method	0.60%	
	Contactless-in-person (flat fee per transaction)	\$0.05	

- 6.3. The total interchange fee that may be received by an issuer for an individual transaction must not exceed the applicable cap – being the lower of the specified maximum set out in cl 7 of Schedule 1 (set out in the third column in Table 1 above) and the “interchange fees per transaction as at 1 April 2021” (**1 April 2021 fees**).⁴¹

⁴⁰ Schedule 1, subpart 3.

⁴¹ This reading is consistent with the Minister’s recommendation that it should be clarified that “interchange fee caps applies [sic] as a hard cap on each transaction, rather than averaged out across transactions.” “Regulation of the Retail Payments System Additional Policy Approvals (8 September 2021) at [63].

- 6.4. In order to determine the applicable fee caps, we must determine whether any 1 April 2021 fee was lower than the specified maximum set out in cl 7 of Schedule 1. If so, the 1 April 2021 fee applies.
- 6.5. This means, as a first step, we must determine the appropriate 1 April 2021 fees.

What are the “interchange fees per transaction as at 1 April 2021”?

- 6.6. Our initial view is that the appropriate 1 April 2021 fee is the actual interchange fee that would have applied to an equivalent transaction between the same issuer and acquirer (based on the merchant, transaction type, and applicable priority rules) on 1 April 2021.
- 6.7. It is the issuer that ultimately sets and charges the interchange fee and therefore the most natural reading is that the 1 April 2021 fee is the actual fee set and charged by the issuer at that time.
- 6.8. In coming to this view, we have also considered whether the 1 April 2021 fee could refer to either (a) the maximum rate set by the scheme; or (b) an average of some kind. However, we do not consider these to be appropriate because:
- 6.8.1. If it was Parliament’s intention that the 1 April 2021 fee was to be the maximum rate set by the scheme at that time, we would have expected this to be expressly spelt out in the IPS.
- 6.8.2. If Parliament had intended averaging across a set of transactions at 1 April 2021, it would have referred to the 1 April 2021 fee as being an average (or something similar) and set out the appropriate timeframe for the averaging.

Information required to confirm 1 April 2021 fees

- 6.9. As issuers customarily adopt the maximum rates set by the schemes, we consider that those maximum rates will likely be the applicable 1 April 2021 fees for each issuer.
- 6.10. However, we will be seeking to confirm the applicable 1 April 2021 fees for each issuer through:
- 6.10.1. Each issuer’s interchange fee schedule that applied as at 1 April 2021, which we understand are generally publicly available; and
- 6.10.2. Information requests. We expect that schemes and issuers should be in a position to provide sufficient information at our request to enable us to verify the interchange fees that would have been charged by an issuer in relation to a particular transaction as at 1 April 2021.

Next steps

- 6.11. Once we have confirmed the applicable 1 April 2021 fees for each issuer, we intend to publish a table (or similar) setting out the applicable fee caps.

Question 6A: We welcome your views on the following questions:

- i. Do you agree with our interpretation of the interchange fees which are considered to be the 1 April 2021 fees? Why/why not?
- ii. Do you agree with our proposed approach for determining those 1 April 2021 fees for each issuer? Why/why not?
- iii. What information could issuers (or other participants, such as the schemes) reasonably provide us to verify the applicable 1 April 2021 fees for each issuer?

Net compensation

- 6.12. The total interchange fee for a transaction includes any net compensation that can reasonably be attributed to the transaction.⁴²
- 6.13. The regulation of “net compensation” is intended to be an anti-avoidance mechanism to prevent the policy of capping interchange fees to be subverted by compensatory payments or other incentives.⁴³ But it is not intended to “limit schemes’ ability to incentivise issuers to switch schemes.”⁴⁴
- 6.14. Based on the definition of “net compensation” in cl 7(4) of Schedule 1, for any amount to qualify as net compensation it must:
- 6.14.1. be a net positive flow of payments, rebates, incentives or other monetary or non-monetary compensation;
 - 6.14.2. be reasonably attributable to the transaction;
 - 6.14.3. be made after the date of Royal assent; and
 - 6.14.4. have the purpose of compensating an issuer for the effect of the IPS.
- 6.15. We discuss each of these elements below.

⁴² Clause 7(4) of Schedule 1, definition of “total interchange fee”.

⁴³ See Hon Dr David Clark “Retail Payment System Bill: Approval for Introduction” (29 October 2021) at [8] and Retail Payment System Bill 2022 (80–2) (select committee report) at 7.

⁴⁴ Retail Payment System Bill 2022 (80 – 2) (select committee report) at 7.

Net positive flow of payments, rebates, incentives or other monetary or non-monetary compensation

- 6.16. Net compensation can include payments, rebates, incentives, or other means of monetary and non-monetary compensation provided directly or indirectly to an issuer.
- 6.17. Monetary compensation includes (among other things):
- 6.17.1. The effect of changes to scheme fees for issuers.⁴⁵
 - 6.17.2. The introduction by an issuer or the scheme of a new fee payable by acquirers which effectively performs the same economic function as an interchange fee.
 - 6.17.3. One-off lump sum payments, as well as ongoing payments.
- 6.18. Non-monetary compensation includes discounts on rewards and reward programmes offering prizes to consumers.⁴⁶
- 6.19. We understand that different methods may be required to determine the value of non-monetary compensation, particularly because the value of the compensation may be recorded differently by the provider and the recipient.

Question 6B:

- i. What other forms of monetary or non-monetary compensation should be included in our consideration of net compensation, if any?
- ii. How is the value of non-monetary compensation (a) determined between the provider and the recipient; and (b) accounted for in the recipient's accounts?

Source of compensation

- 6.20. In principle, net compensation may come from a scheme, acquirer, or some other source.
- 6.21. While compensation must be provided to and/or benefit an issuer (whether directly or indirectly) to be considered net compensation, the IPS is not directly concerned with the source of that compensation.

⁴⁵ While the definition of “monetary compensation” in cl 7(4) of Schedule 1 refers to the “effect of changes to scheme fees for issuers that are also acquirers”, we consider it also captures changes in scheme fees for issuers that are not acquirers.

⁴⁶ Clause 7(4) of Schedule 1.

Meaning of “net value”

- 6.22. In our view, “net value” refers to the total value of any monetary and non-monetary compensation which meets the definition of net compensation.
- 6.23. In certain circumstances, we may consider whether specific payments, incentives, etc., are sufficiently linked, such that the compensation should be the net amount. For example, where the increase in a rebate from the scheme to an issuer is partially offset by an increased payment by the issuer to the scheme in respect of transactions to which the increased rebate relates.
- 6.24. If this were the case, we would expect participants to present evidence that the two (or more) amounts are sufficiently linked.
- 6.25. We understand that some participants view the reference to “net value” in the definition of net compensation (as well as the term “net compensation”) as requiring that any compensation received by an issuer from a scheme be netted off against payments made by an issuer to the scheme, such that there will only be the provision of net compensation where issuer receipts are greater than issuer payments. This is effectively the approach taken in Australia.
- 6.26. We do not consider that the definition of net compensation in the Act lends itself to this interpretation. In particular, the definition of “net compensation” only captures payments that have a purpose of compensating an issuer for the effect of the IPS (as discussed below). We also note that the definition of net compensation does not include any methodology for identifying or calculating qualifying issuer receipts and payments (as is the case under the Australian standard).⁴⁷

Reasonably attributable to the transaction

- 6.27. The total interchange fee only includes net compensation that “can reasonably be attributed to a transaction”, and the definition gives the example of “dividing net compensation for a period by the number or value of relevant transactions during the same period”.⁴⁸ The Select Committee gave an example of a monthly rebate being split across transactions within that period.⁴⁹
- 6.28. Our view is that compensation does not have to be expressed as a figure “per transaction” to qualify as net compensation, but may be a figure payable in respect

⁴⁷ See Australian Standard No.1 of 2016: The Setting of Interchange Fees in the Designated Credit Card Schemes and Net Payments of Issuers (1 July 2017) at cl 5, which sets out a calculation for determining whether issuer receipts exceed issuer payments.

⁴⁸ Clause 7(4) of Schedule 1.

⁴⁹ Retail Payment System Bill 2022 (80 – 2) (select committee report) at 8.

of a period that can then be nominally allocated between transactions in that period.

6.29. The reasonable attribution of compensation will depend on the particular facts and circumstances of the compensation. For example, we may consider (and request information to help us determine):

6.29.1. The time period to which the compensation relates;

6.29.2. Whether the compensation only relates to certain transactions (eg, based on card type or merchant) within that time period; and

6.29.3. Whether the compensation should be attributed equally to all relevant transactions, or on some other basis.

Question 6C: We welcome your views on:

- i. Whether compensation has to be linked to a specific transaction in order to be reasonably attributed to it? If so, why?
- ii. What principles or other matters do you consider to be relevant for the purposes of attributing compensation to specific transactions?

Made after the date of Royal assent

6.30. To qualify as net compensation, the payment or incentive must be made after the date on which the Act receives Royal assent.

6.31. As the Act received Royal assent on 13 May 2022, only compensation provided to an issuer after this date is relevant.

6.32. Our initial view is that compensation agreed before 13 May 2022 may still be relevant for the purpose of calculating net compensation providing the provision/payment occurred after that date.

Purpose of compensating an issuer for the effect of the IPS

6.33. Net compensation may only be taken into account in the calculation of the total interchange fee where the underlying compensation has “a purpose of compensating an issuer for the effect of this standard”.⁵⁰

⁵⁰ Section 7(4) of Schedule 1, definition of “net compensation”.

- 6.34. The effect of the IPS is that issuers' interchange fee revenue is reduced. Accordingly, compensation will have been made for a prohibited purpose where a purpose of that compensation is to compensate an issuer for the loss of interchange fee income caused by the IPS.

Our approach to assessing the purpose of compensation

- 6.35. The assessment of the purpose of compensation payments is fact-specific, and the purpose will be inferred from the facts and circumstances at hand.
- 6.36. We have been guided by the approach of the Courts under the Commerce Act,⁵¹ and consider the following principles to be relevant for assessing the purpose of compensation:
- 6.36.1. It is the purpose of the compensation which is important, rather than any particular participant's purpose.
- 6.36.2. We will take an objective approach to determining the purpose of any compensation, although subjective intentions may still be taken into account.
- 6.36.3. The prohibited purpose only needs to be "a purpose", not necessarily the sole or even dominant purpose.
- 6.37. Where we identify that new compensation has been introduced or existing compensation has been increased, we may seek information from the relevant parties in order to determine its purpose.
- 6.38. We expect the parties involved in the provision of any compensation (whether net compensation or otherwise) to be able to explain the underlying purpose of any compensation. For example, where the amount of a payment by the scheme to the issuer has increased after the date of commencement of the Act, both the issuer and the scheme should be able to explain why that payment has increased.

⁵¹ In particular, we have referred to cases dealing with s 27 of the Commerce Act, including *Giltrap City Limited v Commerce Commission* [2004] 1 NZLR 608, *ANZCO Foods Waitara Limited v AFFCO New Zealand Limited* [2006] 3 NZLR 351 and *Commerce Commission v Bay of Plenty Electricity Limited* HC, CIV 2001-485-917.

Question 6D: We welcome your views on our approach to determining the purpose of compensation. In particular:

- i. What do you consider the effect of the IPS to be?
- ii. What other principles (if any) are relevant to determining the purpose of compensation?
- iii. What information could parties reasonably provide to enable us to assess the purpose of compensation?

Transactions not subject to the interchange fee caps

6.39. The fee caps under the IPS relating to the designated credit networks do not apply to:⁵²

6.39.1. Commercial credit payment products; and

6.39.2. Payment instruments that are issued outside New Zealand.

6.40. The fee caps under the IPS relating to the designated debit networks do not apply to:⁵³

6.40.1. Prepaid payment products; and

6.40.2. Payment instruments that are issued outside New Zealand.

6.41. In addition to those exclusions set out in the IPS, we consider that the fee caps do not apply to ATM transactions (as defined below).

6.42. We deal with each of these exclusions below.

Commercial credit payment products

6.43. Commercial credit payment products (**CCPPs**) are excluded from the fee caps applying to the credit networks under the IPS.

6.44. The definition of a CCPP is set out in cl 7(4) of Schedule 1 as follows:

commercial credit payment product means a credit product that is issued to a business (within the meaning of the Fair Trading Act 1986) for use wholly for purposes other than personal, domestic, or household purposes, and that is charged directly to the account of the business

⁵² Clause 7(2) of Schedule 1.

⁵³ Clause 7(3) of Schedule 1.

6.45. We discuss the elements of the CCPP definition below.

Credit product

6.46. While not defined in the Act, we consider a credit product to be a product which provides the cardholder with access to credit (as defined in the Credit Contracts and Consumer Finance Act 2003)⁵⁴ up to an agreed limit. An example of a credit product is a credit card.

Product must be issued to a business

6.47. We understand that commercial/business products, while relating to a business, may be issued to an individual cardholder. In our view, this will still satisfy the legislative requirement that the product be issued to the business where:

6.47.1. The business has authorised the issue of the product to the individual;

6.47.2. The individual is an employee or agent of the business; and

6.47.3. The product is being charged directly to the account of the business (as discussed below).

Issued for use wholly for purposes other than personal, domestic, or household purposes

6.48. The product must be issued for use wholly for purposes other than personal, domestic, or household purposes.

Purpose of product determined at point of issuance

6.49. The purpose of the product is determined at the point of issuance, rather than on a transaction basis. For example, where a credit product is issued wholly for business purposes, it will still be a CCPP even if it is used for a personal use at some point (subject to whether such use is recurring/ongoing).

6.50. In coming to this view, we have considered:

6.50.1. The plain text of the CCPP definition – which suggests that the purpose is determined at the point of issuance; and

6.50.2. The practical difficulties of determining whether individual transactions are for a personal, household or domestic use, and only applying the applicable caps to those transactions.

⁵⁴ Credit Contracts and Consumer Finance Act 2003, s 6 definition of “credit”.

- 6.51. However, if an issuer becomes aware (or reasonably ought to be aware) that a CCPP is being used on a recurring/ongoing basis for personal, domestic or household purposes:
- 6.51.1. We expect the issuer to rectify this issue, for example, by moving the cardholder to a personal card; and
 - 6.51.2. The credit product may no longer be considered a CCPP, and the fee caps under the IPS apply.
- 6.52. In the event of repeated issues of this nature, we recommend the issuer notify us of what processes have been implemented to prevent the issue reoccurring.

Wholly vs predominately

- 6.53. A product will have been issued for use wholly for purposes other than personal, domestic or household purposes where:
- 6.53.1. The terms and conditions relating to the product require that the product be used wholly for purposes other than personal, domestic or household purposes; and
 - 6.53.2. The cardholder acknowledges and agrees to those terms and conditions.
- 6.54. Where a product is issued for mixed purposes (for example, both business and personal uses), it will be subject to the fee caps under the IPS. This will even be the case where a product has been issued for use predominately but not exclusively for purposes other than personal, domestic or household purposes.

Charged directly to the account of the business

- 6.55. The product must be linked to the account of the business, so that any transactions using that product are charged directly to the account of the business.
- 6.56. We understand there are two ways in which a credit product may be settled:
- 6.56.1. Central settlement – the balance of the product is settled directly from the business' bank account.
 - 6.56.2. Individual settlement – the balance of the product is settled from the personal bank account of the cardholder who is entitled to use the product (who is then usually reimbursed by the business).
- 6.57. Where a product is individually settled it is not being charged directly to the account of the business and is therefore not a CCPP, which means the fee caps under the IPS apply to that product.

Question 6E:

- i. What mechanisms do issuers have in place, and how do those mechanisms operate, to:
 - a. Ensure that a cardholder understands and agrees that a CCPP is to be used wholly for purposes other than personal, domestic or household purposes;
 - b. Determine whether a cardholder is using a CCPP for a prohibited purpose (ie, for a personal, domestic or household purpose);
 - c. Remedy the use of a CCPP for a prohibited purpose? For example, by blocking the use of that product; and
 - d. Ensure that a CCPP is being charged directly to the account of the business?
- ii. How can we best get assurance from participants that credit products are correctly being categorised and treated as CCPPs?

Payment instruments issued outside New Zealand

- 6.58. Payment instruments that are issued outside New Zealand (for example, foreign-issued cards) are excluded from the fee caps applying to both the credit and debit networks under the IPS.
- 6.59. For example, where a credit or debit card is issued in Australia, but used in New Zealand, it will not be subject to the fee caps under the IPS.

Prepaid payment products

- 6.60. Prepaid payment products are excluded from the fee caps applying to the debit networks under the IPS.
- 6.61. Prepaid payment products are not defined in the Act, but in our view they are payment products (whether physical or electronic) which can be used to pay for goods and services using a store of value that has been prepaid/pre-funded.⁵⁵

⁵⁵ We have been guided by the definitions of (a) "Prepaid Card of a Scheme" in the Australian Standard No.2 of 2016 The Setting of Interchange Fees in the Designated Debit and Prepaid Card Schemes and Net Payments to Issuers; and (b) "prepaid payment product" in the Canadian Prepaid Payment Products Regulations SOR/2013-2019.

ATM transactions

- 6.62. We understand that ATM cash withdrawal transactions using credit or debit cards (**ATM transactions**) may be subject to interchange fees.⁵⁶
- 6.63. Although not expressly excluded from the IPS, we consider that the fee caps under the IPS do not apply to ATM transactions.
- 6.64. In particular, the scope of the Act, and therefore the IPS, is limited to “retail payments” – being the payment by a consumer to a merchant for the supply of goods and services.⁵⁷
- 6.65. We do not consider that ATM transactions meet the definition of “retail payments” and therefore are not captured by the IPS.

Question 6F: Should ATM transactions be subject to the fee caps under the IPS?

Inadvertent contraventions

- 6.66. We understand that there have been instances where an incorrect interchange fee has been applied to certain transactions within Mastercard and Visa’s respective networks. For example, a transaction may be assigned an incorrect indicator (applying the incorrect card or merchant type) and therefore attract an interchange fee which is too high.
- 6.67. Participants may still be liable for a contravention of the IPS even if the contravention was inadvertent. However, our assessment of the contravention will take account of the particular facts and circumstances.
- 6.68. We expect participants to have arrangements in place to:
- 6.68.1. Identify whether any erroneous interchange has been charged; and
 - 6.68.2. Address a situation where an erroneous interchange fee has been charged, including by ensuring that costs are reimbursed and not passed on to consumers and merchants.

⁵⁶ Mastercard Rules (7 June 2022), cl 8.1.1 – the definition of interchange fee refers to it being paid by an acquirer to an issuer in respect of a “Merchandise Transaction conducted at an ATM Terminal”.

⁵⁷ Section 7, definition of “retail payment”.

Question 6G: We are seeking your views on the following:

- i. What mechanisms do participants currently have in place, and how do those mechanisms work, to:
 - a. Identify whether an erroneous interchange fee has been charged; and
 - b. Address a situation where an erroneous interchange fee has been charged?
- ii. How are parties made good after an erroneous interchange fee has been detected? In particular, how are merchants made good where the effect of any erroneous interchange fee has flowed directly through to them via the interchange plus pricing model?

7. Information required to assess compliance

Engagement with participants

- 7.1. We will continue to engage with participants up to, and following, the IPS coming into force to understand the processes participants are following to comply and any issues they encounter.
- 7.2. We may also ask participants to provide us with a 'walk-through' of their compliance processes and/or provide a written explanation of their compliance processes, including what changes they have made internally to ensure compliance with their obligations under the IPS. For example, we may request participants explain what procedures they have implemented to ensure that only products which meet the criteria set out in paragraphs 6.43-6.57 above are being classified as commercial credit payment products.

Relevant information

- 7.3. In addition to engagement with participants, we expect a range of information will assist us to assess compliance with the obligations under the IPS.
- 7.4. This will include:
 - 7.4.1. **Interchange fee information** – ie, information to enable us to determine whether the interchange fees being charged are compliant with the fee caps; and
 - 7.4.2. **Net compensation information** – ie, information to enable us to determine whether there has been the provision of any net compensation.
- 7.5. We will also require the information necessary to confirm the 1 April 2021 fees as set out in paragraph 6.10 above.
- 7.6. We will engage with participants in relation to the collection of this information.

Interchange fee information

- 7.7. Average interchange fee data for each interchange fee category will be relevant to our assessment of whether the fee cap is being complied with.
- 7.8. Accordingly, we will require the following information from the schemes in respect of each issuer on the initial designated network:
 - 7.8.1. Total value of interchange fees paid to the issuer in respect of debit network transactions, broken down by interchange fee category;

- 7.8.2. Total number of debit network transactions for which interchange fees were paid to the issuer, broken down by interchange fee category;
 - 7.8.3. Total value of debit network transactions for which interchange fees were paid to the issuer, broken down by interchange fee category;
 - 7.8.4. Total value of interchange fees paid to the issuer in respect of credit network transactions, broken down by interchange fee category;
 - 7.8.5. Total number of credit network transactions for which interchange fees were paid to the issuer, broken down by interchange fee category; and
 - 7.8.6. Total value of credit network transactions for which interchange fees were paid to the issuer, broken down by interchange fee category.
- 7.9. Using this information we can calculate the relevant average interchange fee for each interchange fee category. Where any average differs from the published interchange fee, we may require further information in order to determine the reason for that difference.

Net compensation information

- 7.10. To understand whether net compensation has been provided to an issuer, we first need to understand the incentive arrangements/payments in place prior to the IPS being in force. Ie, we need to establish a 'baseline' upon which we can assess any changes.
- 7.11. This information will enable us to establish whether any incentive arrangements/payments change or increase after the IPS comes into force.
- 7.12. Visibility of any compensation between schemes and issuers once the IPS is in effect is necessary to ascertain:
 - 7.12.1. whether any compensation has occurred; and
 - 7.12.2. whether that compensation meets the definition of net compensation (for example, whether it has a purpose of compensating an issuer for the effect of the IPS).
- 7.13. We anticipate initially focussing on the compensatory arrangements of larger issuers.

Pre-IPS compensation

- 7.14. We consider that we will require the following information for the period from 1 July 2021 to 30 June 2022, prior to the IPS coming into force, in order to determine a 'baseline' of compensatory arrangements:
- 7.14.1. An account of any payments, rebates, incentives, or other means of monetary and non-monetary compensation paid by the scheme to the issuer;
 - 7.14.2. An account of any payments made by the issuer to the scheme;
 - 7.14.3. An explanation of how these incentives were determined (ie, any formulas linked to either value or number of transactions and the actual value and number of transactions in the reporting period); and
 - 7.14.4. Any information necessary for us to understand the time period over which compensation is spread. For example, a payment made to an issuer in June 2020 that is linked to the issuance of cards over a three-year period will be relevant to determining the 'baseline' of compensatory arrangements.

Post-IPS compensation

- 7.15. We will also require the following information after the IPS is in force to enable us to assess whether any net compensation has been provided:
- 7.15.1. An account of any payments, rebates, incentives, or other means of monetary and non-monetary compensation paid by the scheme to the issuer;
 - 7.15.2. An account of any payments made by the issuer to the scheme; and
 - 7.15.3. . A written explanation for any increases in compensation (including new types of compensation) which have not been driven by fluctuation in the volume of transactions

Question 7A: We are interested in your views on the scope of the information we consider is required to assess compliance with the obligations under the IPS, including:

- i. Do you agree that the information we have identified is the right information to enable us to assess compliance with the obligations under the IPS? Why/why not?
- ii. What alternative information, if any, can provide us with assurance that the IPS is being complied with?

Appendix 1 – Relevant definitions under the network rules

1. Definition of “issuer”

- a. Set out below is the definition of “issuer” under the Mastercard Rules:⁵⁸

Issuer

A Customer in its capacity as an issuer of a Card or Account.

- b. Set out below is the definition of "issuer" under the Visa Rules:⁵⁹

Issuer	<p>In the AP Region, Canada Region, CEMEA Region, LAC Region, US Region: A Member that enters into a contractual relationship with a Cardholder for the issuance of one or more Card products.</p> <p>In the Europe Region: A Member that issues a Card to a Cardholder and maintains the contractual privity relating to the Card with that Cardholder.</p>
<small>ID# 0024768 Edition: Apr 2022 Last Updated: Oct 2016</small>	

2. Definition of “acquirer”

- a. Set out below is the definition of “acquirer” under the Mastercard Rules:⁶⁰

Acquirer

A Customer in its capacity as an acquirer of a Transaction.

- b. Set out below is the definition of “acquirer” under the Visa Rules:⁶¹

Acquirer	<p>A Member that signs a Merchant or Payment Facilitator, provides a Cash Disbursement to a Cardholder, or loads funds to a Prepaid Card, and directly or indirectly enters a Transaction into Interchange.</p> <p>In the Europe Region: A Member that either:</p> <ul style="list-style-type: none"> • Enters into an agreement with a Merchant for the display of any of the Visa-Owned Marks and the acceptance of Visa products and services • Disburses currency to a Cardholder, except where “Acquirer” is otherwise defined for the Europe Region in the Visa Rules
<small>ID# 0024219 Edition: Apr 2022 Last Updated: Apr 2020</small>	

⁵⁸ Mastercard Rules, at Appendix C. At: <https://www.mastercard.us/content/dam/mccom/global/documents/mastercard-rules.pdf>.

⁵⁹ Visa Core Rules and Visa Product and Service Rules, at Glossary. At: <https://usa.visa.com/content/dam/VCOM/download/about-visa/visa-rules-public.pdf>.

⁶⁰ Above at n 62.

⁶¹ Above at n 63.

3. Definition of “Interchange Fee”

- a. Set out below is the definition of “interchange fee” under the Mastercard Rules:⁶²
1. “Interchange fee” means an amount paid by the Acquirer to the Issuer with respect to the interchange of a Transaction conducted by a Merchant or a Merchandise Transaction conducted at an ATM Terminal. All references to interchange fees in this section mean both the levels of the fees and all qualifying criteria and conditions for their applicability.
- b. Set out below is the definition of “interchange fee” under the Visa Rules:⁶³

Interchange Reimbursement Fee (IRF)	A fee between Acquirers and Issuers in the Clearing and Settlement of an Interchange Transaction.
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⁶² Above n 62, at 8.1.

⁶³ Above n 63, at Glossary. While we understand this refers to “interchange reimbursement fee” rather than “interchange fee”, we still consider this to be the appropriate definition for the purposes of establishing the “interchange fee” definition under cl 1 of Schedule 1 of the Act.

Appendix 2 – Submission template

Chapter 5: Participants required to ensure compliance with the IPS

5A	Are you aware of any issuer setting or bilaterally agreeing an interchange fee which is below the maximum rates since 31 March 2021? If so, please provide details of the arrangement.
5B	Have we accurately described how interchange fees are set, assigned and charged in practice? If not, please provide an explanation.
5C(i)	Do you agree with our analysis of scenario one? Why/why not?
5C(ii)	Do you agree with our analysis of scenario two? Why/why not?
5C(iii)	Are there any additional high-level scenarios you see benefit in us considering at this stage? If so, please provide a description of those scenarios.

Chapter 6: Total interchange fee caps under the IPS

6A(i)	Do you agree with our interpretation of the interchange fees which are considered to be the 1 April 2021 fees? Why/why not?
6A(ii)	Do you agree with our proposed approach for determining those 1 April 2021 fees for each issuer? Why/why not?
6A(iii)	What information could issuers (or other participants, such as the schemes) reasonably provide us to verify the applicable 1 April 2021 fees for each issuer?
6B(i)	What other forms of monetary or non-monetary compensation should be included in our consideration of net compensation, if any?
6B(ii)	How is the value of non-monetary compensation (a) determined between the provider and the recipient; and (b) accounted for in the recipient's accounts?
6C(i)	Do you consider that compensation has to be linked to a specific transaction in order to be reasonably attributed to it? If so, why?
6C(ii)	What principles or other matters do you consider to be relevant for the purposes of attributing compensation to specific transactions?
6D(i)	What do you consider the effect of the IPS to be?
6D(ii)	Do you consider any other principles to be relevant to determining the purpose of compensation?
6D(iii)	What information could parties reasonably provide to enable us to assess the purpose of compensation?

6E(i)	<p>What mechanisms do issuers have in place, and how do those mechanisms operate, to:</p> <ul style="list-style-type: none"> a) Ensure that a cardholder understands and agrees that a CCPP is to be used wholly for purposes other than personal, domestic or household purposes; b) Determine whether a cardholder is using a CCPP for a prohibited purpose (ie, for a personal, domestic or household purpose); c) Remedy the use of a CCPP for a prohibited purpose? For example, by blocking the use of that credit product; and d) Ensure that a CCPP is being charged directly to the account of the business?
6E(ii)	How can we best get assurance from participants that credit products are correctly being categorised and treated as CCPPs?
6F	Should ATM transactions be subject to the fee caps under the IPS?
6G(i)	<p>What mechanisms do participants currently have in place, and how do those mechanisms work, to:</p> <ul style="list-style-type: none"> a) Identify whether an erroneous interchange fee has been charged; and b) Address a situation where an erroneous interchange fee has been charged?
6G(ii)	How are parties made good after an erroneous interchange fee has been detected? In particular, how are merchants made good where the effect of any erroneous interchange fee has flowed directly through to them via the interchange plus pricing model?

Chapter 7: Information required to assess compliance

7A	We are interested in your views on the scope of the information we consider is required to assess compliance with the obligations under the IPS, including:
7A(i)	Do you agree that the information we have identified is the right information to enable us to assess compliance with the obligations under the IPS? Why/why not?
7A(ii)	What alternative information, if any, can provide us with assurance that the IPS is being complied with?

Additional comments:

[Insert Ref]	<i>[Please provide any additional comments which are not covered by the questions set out above.]</i>
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